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THE PRINCIPLES OF THE LAW OF BANKRUPTCY AND DEEDS OF ARRANGEMENT

SECOND EDITION

BY

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IN THE UNIVERSITY OF LONDON**

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LONDON:

**BUTTERWORTH & CO. (PUBLISHERS), LTD.
BELL YARD, TEMPLE BAR,**

SHAW & SONS, LTD., 7—9, FETTER LANE,

SYDNEY:

MELBOURNE:

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WELLINGTON (N.Z.):

BUTTERWORTH & CO. (AUSTRALIA), LTD.

BUTTERWORTH & CO. (INDIA), LTD.

BUTTERWORTH & CO. (CANADA), LTD.

BUTTERWORTH & CO. (AUSTRALIA), LTD.

1939

PRINTED IN GREAT BRITAIN

PRINTED IN GREAT BRITAIN BY
THE STANHOPE PRESS LTD.
ROCHESTER : : KENT

PREFACE TO SECOND EDITION

In preparing the second edition the Authors have to some extent been guided by the suggestions made in respect of the first edition from various sources. This has led to the inclusion of a chapter on Bankruptcy Offences, the work of Mr. A. T. James.

The old text has been thoroughly revised and in many places largely rewritten. This has not been the result so much of new law, since, with the exception of such matters as the effect of execution, the Courts have been quiescent on principles, but in order to render the book easier to those unfamiliar with the subject. In deference to critics some of the extracts from judgments have been shortened or omitted, but many have been retained because they are regarded as an essential characteristic of the work. While the Authors do not depreciate the value of reference to the original reports it is felt that students, especially those not preparing for the profession of the law, need guidance in the use of facts and judgments. Furthermore, the rather more extended application of legal principles to be found in the extracts from judgments form a valuable training for any student of the law. Some rearrangement and changes in format have been made in order to emphasise the relation between principles of the law and exceptions. Again, it is desired to emphasise that although bankruptcy law is in its inception and growth very much a matter of statute, the great body of case law by way of interpretation has led to the development of principles which can more satisfactorily be understood as a whole and upon the basis of judicial decision rather than as a mass upon individual sections of an Act of Parliament. Hence the Authors have adhered to a system of exposition based upon logical order and dealt with sections as they affect the principles concerned.

It is hoped, therefore, that critics may be able to accord an even warmer appreciation to this edition than to the first. For convenience it should be added that the work of revision has been accomplished by the Authors as follows:

The Introduction and Chapters 1, 6, 7, 8, 9, 12 and 13 are the work of the first named; Chapters 2, 3, 4, 14, 15, 16 and

17 are the work of the second named; and Chapters 5, 10 and 11 are the work of the last named author.

Apart from the new chapter the work has been only slightly enlarged in the process of rewriting and revision, and this primarily for the sake of clarity or emphasis, but the format has undergone considerable changes and this may have the appearance of greater extension than has in fact taken place.

The Authors' thanks are due in the first place to reviewers and to numerous critics who have kindly placed their views before the publishers. If all their suggestions have not been adopted their views have always received careful consideration. In the second place, thanks are due to the publishers for the trouble they have taken in revising the format of the book and in passing it through the press, and for having undertaken the arduous and unpleasant task of preparing the Tables of Cases and Statutes and the Index.

It is to be noted that the relative cases have been brought up to date as at December 31st, 1938.

H.P.
T.A.
A.W.D.

March, 1939.

PREFACE TO FIRST EDITION

THE appearance of this book demands some explanation. Rather more than seven years ago the Publishers approached the first-named Author with the suggestion that he should write a legal text-book for them. The suggestion then made was that a book on the principles of Insolvency should be written by the two first-named Authors, to include, of course, the Insolvency of Corporations. During the following year the first-named Author completed the greater part of his share of the present work and the second-named Author half of his, but owing to a variety of causes the work was not completed.

Some years later the Publishers pressed for the manuscript, not in the original design, but in the form of a book on Bankruptcy, and, in the completion of the task, the original Authors were fortunate to secure the assistance of Mr. Dickson. In carrying out this new purpose, the Authors have had in mind the needs of other professional students besides those taking to the profession of the law, and especially those concerned with accountancy. This is the reason for the lengthy treatment of the powers and duties of trustees and the proof of debts. That part of the work which was written six years ago has been carefully revised in the light of the new design and later developments of the law, and it is thought that it is not inconsistent with the general plan of the book as it now appears. Although the work as a whole has been considered and revised to some extent by all the Authors, each has been responsible for different parts of the book, and it may be convenient to indicate their respective shares, which are as follows: pp. 1-33, pp. 127-250, and pp. 287-297 are the work of the first-named; pp. 34-107 and pp. 298-339 of the second-named; and pp. 107-126 and p. 250-281 of the last-named Author who is also responsible for the Tables of Cases and Statutes.

The chapter on "Declaration of Dividends" is the work of Mr. E. E. Wagstaff, Assistant Official Receiver of the Coventry County Court, to whom the Authors are much indebted for permission to use this section.

The expression "Elementary Principles" in the title to this book is used in a twofold sense. First, that which is usually applied to a students' book, which only pretends to give a

sketch of the subject, and does not incorporate all the details which may be found in a work of reference. In this connection all that is meant is that the Authors have tried to state only what is most important or essential, and selection has been the serious task. Secondly, and more importantly, an effort has been made to state fundamental principles, and the reasons upon which these principles depend. For this purpose many extracts from judgments have been given, not merely that the law may be accurately stated, but that principles may be adequately comprehended. This was the task which the Authors had set themselves for the original plan, but the departure from that plan has entailed some modifications, particularly in those sections dealing with the proof of debts and duties of a trustee. This method of exposition has naturally increased the length of the work beyond what would have been necessary for a mere enumeration of the rules of law, but it is hoped that the lack of brevity is amply compensated for in the examples of the application of principles, and particularly that the reader will be thereby enabled to acquire a scientific knowledge of the subject. 8

An attempt has been made to simplify the work of the student by employing different types, but he should remember that though judgments are printed in small type their contents are most important. For this part of the work the Authors are much indebted to Mr. J. W. Whitlock, M.A., LL.B., for very valuable assistance.

H. P.
T. A.
A. W. D.

October, 1932.

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THE PRINCIPLES OF THE LAW OF BANKRUPTCY AND DEEDS OF ARRANGEMENT

INTRODUCTION

Insolvency and its Effect.—Insolvency exists where a man is unable to meet his debts as they fall due. This inability to pay debts may be due to a variety of causes of differing seriousness. A business catastrophe involving heavy capital loss may prevent the debtor from meeting his business engagements either temporarily or permanently. Persistent borrowing may leave the debtor without means, but the falling in of an expectancy may enable him to pay his creditors. It is where the probability of payment has become more remote that creditors may deem it advisable to recover what they can without waiting longer for payment in the course of time. It is not the actual insolvency which is material, but the prospect of payment within a reasonable time.

Consequently, insolvency of itself will, at least during the life of the debtor, have no immediate legal effect upon his property. Some further steps must be taken to put the creditors in a different position. The appropriate steps will depend upon the circumstances. It may, in some cases, be adequate to recover judgment, and proceed by way of judgment summons to ensure payment by instalments (see *post*, p. 71). This course involves only the independent action of the creditors, in which their individual rights in respect of the debtor's property will not be treated as a whole. Nor is it necessary in fact that the debtor should be insolvent before such a step is taken.

Administration of an Insolvent's Estate.—The object of this book, however, is to deal with the administration of an insolvent's estate for the benefit of his creditors generally, although this may be the result of the action of a single creditor or group of creditors. Two principal courses may be pursued.

- (i) The administration may be carried out under the control of the court, either as administration in bankruptcy or by way of judicial composition.
- (ii) Alternatively, by means of a deed of arrangement control of the debtor's assets may remain in the hands of a trustee appointed by the creditors.

Under a deed of arrangement it is immaterial whether or not the debtor is insolvent, but he is never judicially declared to be insolvent and is free from the disabilities legally attaching to bankruptcy. Consequently this extra-judicial process is often preferred by debtors, and sometimes by creditors, although it entails certain disadvantages. Besides avoiding the disabilities of bankruptcy, it has the additional advantage that it should save much in the expense of administration.

Where, however, administration comes before the Court, the debtor may or may not be declared judicially insolvent. If a composition under the order of the Court is made, no adjudication or judicial declaration of insolvency will be made, or, if it has been made, it will be annulled, thus causing the debtor to revert to his original status, but all the delay, and much of the expense of bankruptcy, will be incurred. In the event of an adjudication, which is not annulled, the debtor will become subject to very serious disabilities. He cannot become a creditor for more than £10 (in one transaction) without disclosing his position or he will become liable for criminal penalties (see *post*, p. 311). Again, his property, though acquired after adjudication, will be at the disposal of the trustee in bankruptcy, subject to certain exceptional circumstances (see *post*, p. 221).

In all these cases, whether there is a judicial proceeding or not, the administration of the debtor's property at the time the proceedings are completed will pass from the debtor to some third party, and it is this that they have in common. When a man is in financial difficulties the creditors must face these alternatives if they are to act together.

It is now important to realise that, although a man may be declared bankrupt, he may not be, in fact, insolvent. For the purposes of law he will be insolvent unless and until his bankruptcy is annulled, or he is discharged, but he may have more than is necessary to pay his debts. There is the story of the Irish Peer who not long ago filed his own petition in bankruptcy on the ground, as he declared, that could he collect his

Irish rents he would be much more than solvent, and he desired to see if the Official Receiver was an abler rent-collector than he. If a debtor has done certain things, known as acts of bankruptcy (see *post*, p. 47), he will be at the mercy of his creditors to make him bankrupt, though by paying his debts in full he may regain his status as a solvent man by getting his bankruptcy annulled (see *post*, p. 105). On the other hand, if he has committed no act of bankruptcy, his creditors as a body are unable to make him judicially insolvent, that is, bankrupt, though in fact he may be insolvent many times over. Whether this latter fact is not the reason of many frauds is a matter for the legislature and not the lawyer.

History of Bankruptcy Legislation.—The complicated state of affairs represented by the law of insolvency has a long history of legislative experiment (*a*). Unlike most branches of law, bankruptcy is the creation of statute, though the interpretation of the Bankruptcy Statutes has developed a body of law (some of which has since been codified), which is known by the somewhat misleading name of the Common Law of Bankruptcy. The earliest of the statutes is 33 & 34 Hen. 8, c. 4 (1542-43), although Coke (Fourth Inst., p. 276) says that the first statute was one of 25 Edw. 3, stat. 3, c. 23, against Lombards, "who after they had made obligations to their creditors, suddenly escaped out of the realm without any agreement made with their creditors." Indeed, Coke said: "We have fetched as well the name as the wickednesse of bankrupts from foreign nations." However satisfactory this statement may be to the patriotic sentiments of Englishmen, the reason for the statute of Henry VIII, and its subsequent elaboration in the reigns of Elizabeth and James I, appears to lie in the inadequacy of the Common Law to provide any general remedy for the body of the creditors. This led to too frequent applications to the Council to supply the deficiency. On the Continent the mercantile community had for some time adapted the *cessio bonorum* of Roman Law to meet their needs. Having rejected the Civil Law as part of our legal system, resort was had to statutory interference. The Act recites the reason of its existence in the following words:

(a) For the early history of bankruptcy the inquiring reader is referred to Holdsworth, "History of English Law," Vol. I, pp. 470-73, and Vol. VIII, Chap. IV, s. 6, and for the later history Robson, "Bankruptcy," 11th Ed. Introduction.

“divers and sundry persons, craftily obtaining into their hands great substance of other men’s goods, do suddenly flee to parts unknown, or keep their houses (*b*), not minding to pay or restore to any their creditors, their debts and duties.”

Penal Character of Early Law.—The bankruptcy law, in its origin, was by nature penal. It regarded the insolvent man as a wrongdoer, and was designed to put his property at the disposal of his creditors. This purpose was to be achieved by commissioners who were appointed by the Lord Chancellor, although in the first statute it was the Lord Chancellor himself and certain other officials who were to seize the property. This elementary legislation of Henry VIII was early replaced by a statute of Elizabeth (13 Eliz., c. 7), amended and enlarged by two other statutes (1 Jac. 1, c. 15, and 21 Jac. 1, c. 19).

These three statutes are the foundation of this aspect of the bankruptcy law. In the first place, they laid down what acts rendered a man liable to be made bankrupt, such, for example, as keeping house or departing the realm with intent to hinder or delay creditors, and acts associated with arrest for debt. They also contained provisions giving powers to the commissioners to enable them to arrest the debtor and examine him, as well as their authority in respect of his property. Rules for the administration of the debtor’s property and for setting aside fraudulent conveyances by the debtor were also included.

Principal Factors in Early Statutes.—The two most significant facts about this legislation were, first, that it was confined to traders (*c*), and, secondly, that no provision of any kind appears by means of which a bankrupt could be released from his debts when his property had been taken from him, *i.e.* there was no discharge in bankruptcy as we now know it. Remembering the penal nature of the legislation this is not surprising; it was a remedy against those who, in the words of Coke, “had rioted in three kinds of costliness, viz., costly building, costly diet, and costly apparell, accompanied with neglect of his trade and servants, and thereby consumed his wealth.” The unfortunate trader, who, through accident or the evil treatment of others, found himself insolvent, was

(*b*) It is interesting to notice how this still remains an act of bankruptcy (see *post*, p. 62).

(*c*) Until very recently married women could only be made bankrupt if they carried on a trade or business.

disregarded. A man, who was a bankrupt, was *ipso facto* a malignant and fraudulent person, and this policy became so ingrained in our legislation, and perhaps in our national outlook, that a trace of it has survived to the present day.

The policy of these statutes was first to ensure that the whole of the debtor's property was put at the disposal of his creditors. Secondly, they established rules for the equitable distribution of this property among the creditors, including the prevention of unjust advantage to be obtained by one creditor over the others through use of the forms of execution.

Discharge from Bankruptcy.—Under the early law any debtor who had an equity to be relieved from the rigours of the bankruptcy law, but was without release, was left to apply to the Council. This course was followed during a long period of history, and until the Restoration appears to have worked with at least some success, since the meritorious or, at least, not malignant bankrupts have always been less than the total number, and in a less complicated state of society may well have been a smaller proportion than at the present day. After the Restoration the Council ceased to function, and almost immediate steps had to be taken for the relief of distressed debtors, more particularly those imprisoned. At that time, of course, imprisonment for debt was a natural course, and, in fact, the commissioners in bankruptcy would, as part of their function, imprison the debtor. The earlier statutes were not very effective, apparently, and were confined, in the main, to ameliorating the lot of the prisoner rather than to releasing him. More particularly they were confined to the poor debtor. However, in the reign of Queen Anne a new policy was adopted by the statute 4 Anne, c. 17. By this Act a debtor who had surrendered himself and his property to the commissioners was enabled, with the consent of a specified majority of his creditors, to apply to the commissioners for a certificate of conformity. This certificate, having declared that he had conformed to the bankruptcy law, freed both his person and any property that he might thereafter acquire from liability for the debts incurred by him up to the time of his bankruptcy. To use modern phraseology, this certificate was a discharge in bankruptcy (see *post*, p. 296).

By 4 Anne, c. 17 the bankruptcy law was put upon a different footing. It had not, perhaps, ceased to be a penal system for the more efficient protection of creditors from fraudulent

debtors, who hindered trade and commerce by preying upon the credulous or ill-informed public, and by wasting the substance of the community. It had, however, introduced a method of equitable arrangement between the unfortunate trader and his creditors, which should stabilise credit with the least injury to the dictates of common humanity. Having reached this stage of development, it is little surprising that the combined effect of a desire to ascertain the result of the system and of the stagnation of reforming zeal common to the eighteenth century resulted in no further bankruptcy statute of importance (*d*) until 1825 (6 Geo. 4, c. 16).

Common Law of Bankruptcy.—It was during this long period of the eighteenth century that the Common Law of Bankruptcy was really developed. Although the statutes were not inconsiderable in number, the rapid progress of the complexity of English society naturally required adjudication upon many points which the framers either could not have foreseen, or, from the indifferent manner in which Acts were framed, had failed to cover. This work fell upon both the Common Law Courts and the Chancery. Since the Lord Chancellor was responsible for the appointment of the commissioners in bankruptcy he exercised over them a general supervision, and applications to him might be made in the way of guidance or appeal.

The contributions of the Common Law judges were mainly confined to decisions upon the express wording of the statutes; as, for example, whether a man was in fact a bankrupt.

In *Bonham's Case* (*e*) it was said: "Because the party has no other remedy, if the commissioners do not pursue the act of their commission, he shall traverse that he was not a bankrupt, although the commissioners affirm him to be one."

Chancellors and Bankruptcy.—In many cases, the Lord Chancellor would order an issue on some point involving a question of Common or Statute Law to be tried by the Common Law Courts. From the nature of things these decisions could add little or nothing to the principles of bankruptcy law, since they depended on details. On the other hand, from the earliest statutes the Chancellor had exercised an authority to interfere

(*d*) The provision for discharge was continued in a statute (5 Geo. 2 c. 30).

(*e*) 8 Co. Rep. at f. 121a.

in cases of unfair dealing (*f*), and during the latter part of the seventeenth century, and during the eighteenth century, this control became very much more extensive. This was not surprising, since the Chancery to a certain extent now fulfilled the rôle of providing that residue of justice formerly exercised by the King in Council, and the Chancellor was accustomed to provide for inadequacies of the Common Law. Consequently the Court of Chancery came to decide many questions relating to the administration of the debtor's property, and the proof of debts and the ranking of creditors' liabilities. It is this branch of the law that is described as the Common Law of Bankruptcy. The inadequacy of this description becomes apparent when it is realised that the Chancellor applied equitable principles which by the eighteenth century had become wider, and still are more flexible, than the Common Law. Hence, the Common Law of Bankruptcy is more aptly termed the Equity of Bankruptcy Law.

Owing to the peculiar nature of its rules, and to the fact that for some generations the law of bankruptcy was administered by the Common Law judges, this aspect of the subject has been overlooked to some extent, and is not incorporated into discussions on the principles of Equity. However, in a recent case there has been a reminder of the true nature of this branch of the law of bankruptcy. Nor, it is submitted, is this a matter of academic interest alone, because it has been held more than once that the fountain of Equity has not run dry, and that new facts, interpreted in the light of equitable doctrines, may yet give rise to developments still unexplored. This view appears to be supported by the recent decision just mentioned.

In *Mathieson's Trustee v. Burrup* (*g*), a point arose which had not previously been adjudicated. The question was whether in bankruptcy a debt recognised only in equity could be set off against a legal claim. From the angle of pure Common Law an equitable claim could not be recognised, so could not be set off against a legal claim. The Court held, applying equitable principles, that it could, because in equity debts whether legal or equitable are both debts. CLAUSON, J. (at p. 569), put the position very clearly when he said:

"The Bankruptcy Act, as I understand it, is an Act regulating the proceeding on equitable principles, recognising

(*f*) *Wood v. Hayes* (1606), Tothill, 62. (*g*) [1927] 1 Ch. 562.

INTRODUCTION

“equitable debts, subject, of course, to such infirmities as are sometimes present, but drawing no distinction between equitable and legal rights for purposes of administering the estate of the bankrupt. I think, at this time of day, it would be very unfortunate, if it were held that a Court of Bankruptcy is in any way fettered by any such distinctions, except so far as any Court of Equity is fettered by the fact that certain infirmities may in certain circumstances attach to equitable rights as compared with corresponding legal rights.”

It is respectfully submitted that this is the true historical perspective of the development of that branch of the bankruptcy law which is usually called the Common Law of Bankruptcy. It may be mentioned that the additions to the bankruptcy law have been so gradual, and so frequently incorporated in later legislation, that it is not now necessary for the student to study this branch of the law separately from statutory provisions, but its existence may at any time have a beneficial application in the interpretation of that law upon the facts of a given case.

Consolidation of the Law.—The nineteenth century saw the introduction of a long series of enactments relating to the bankruptcy law gradually, by consolidation and amendment, laying the foundations of the present system. It is impossible, within the scope of this book, to give details, but some of the principal features of change may be selected to show the development of the modern idea of bankruptcy.

Reforms in Bankruptcy Tribunals.—The statute of 1825 (6 Geo. 4, c. 16) displayed the more modern attitude towards the bankrupt by incorporating provisions enabling an insolvent trader himself to put on foot proceedings leading to bankruptcy in order to rid himself of his misfortunes. The Act was perhaps more remarkable for making the first provision for judicial compositions to avoid bankruptcy. Naturally, the provisions were experimental, and the notion of the majority of creditors binding the minority appeared in a very modified form (*h*). This Act did not affect the machinery for administering the law, though it consolidated that law. This innovation was made by the Act of 1831 (*i*). A Court of Bankruptcy was set up with its own judges and commissioners. There was also

(*h*) At the present day a single creditor can, within limits, upset an *extra-judicial* composition (see *post*, p. 24).

(*i*) 1 & 2 Will 4, c. 56.

a Court of Review, but appeal still lay to the Lord Chancellor, and/or with sanction to the House of Lords. The Act also introduced official assignees whose function it was to administer the property, and who continue to exist under the name of Official Receivers at the present day, though their duties have been varied. Registrars were instituted, and it is the Registrar upon whom the bulk of the judicial work now falls (see *post*, p. 35). This is in form bankruptcy administration much as it exists to-day, except that the commissioners have by virtue of one or two statutes ceased to exist, and their place has been more than taken by the County Courts.

Judicial Discharge.—The statute of 5 & 6 Vict. c. 122, introduced the extremely important innovation that certificates of conformity could be granted by the commissioner acting instead of requiring the consent of the creditors. From the point of view of the development of bankruptcy as a method of relieving the unfortunate this was manifestly a great advance.

Shortly after this the Court of Review was abolished and replaced by appeals to other Courts, which, however, retained their equitable character. The changes in the appellate tribunals, are, however, not of sufficient importance to trace further.

In the year 1849 came the first great consolidating statute (Bankruptcy Law Consolidation Act), the interpretations of which are still frequently consulted as authorities on the present law. The Act considerably extended the powers of the commissioners in connection with certificates of conformity, and enabled them to suspend a certificate, or to attach to it certain conditions; in certain specified cases it could not be granted. It also developed the system of judicial compositions with creditors and increased their general utility.

It was, however, found by experience that the 1849 Act was by no means free from objection. This was particularly the case of the discharge, because the certificate was apt to exonerate after-acquired property where it should be taken. In other cases there was a tendency to delay or defeat the right of an unfortunate debtor to release. Furthermore, there were many complaints against the cumbersomeness of the procedure and its expense. This resulted in the Bankruptcy Act of 1869.

Modern Reforms.—The Bankruptcy Act, 1869, was the first of the really modern Acts. In the first place it reformed

the machinery to make it conform more or less to its present system of a London Bankruptcy Court (now part of the Supreme Court) and the County Courts (see *post*, p. 33). It introduced in place of the official assignee the modern trustee in bankruptcy appointed by the creditors (see *post*, p. 107), and, until a trustee was appointed, the property was vested in the Registrar (the Official Receiver was the offspring of the Act of 1883).

Furthermore, the Committee of Inspection was instituted (see *post*, p. 107). Virtually speaking, this was the swing of the pendulum from purely official administration to that by the creditors and their nominee with some supervision by the Court.

Some amendments were introduced into the general law; for example, some changes were made in the position of voluntary settlements, and the conditions for granting a discharge were specified. Thus an unconditional discharge could only be granted if the debtor paid 10s. in the £ on his debts, although if he failed to do so and waited for three years, it could be obtained provided that the balance to make up 10s. in the £ became a judgment debt. In certain circumstances the discharge could be refused or suspended. These rules represent the modern principle for the grant of a discharge (see *post*, p. 296), which was more elaborately provided for in the Act of 1883.

The criminal jurisdiction hitherto exercised by the Bankruptcy Court was transferred to the ordinary criminal tribunals, while the Debtors Act of the same year practically eliminated imprisonment for debt.

Prior to the Bankruptcy Act of 1869 the class of bankrupts was extended to cover persons who were not traders (Bankruptcy Act, 1861) (*k*), so that this Act became a bankruptcy code (if it may be so called) for the whole community. The Act also went one step further in regulating compositions with creditors made out of Court so as to render these arrangements more effective as a method of dealing with financial difficulties.

In substance, therefore, the present law of bankruptcy and arrangements by insolvent debtors was established.

While these principles were admittedly sound, they were not always found satisfactory in working, and it was thought that so wide a latitude allowed to creditors tended to prevent

(*k*) Even before this Act some relief was possible for non-traders in the Court for the Relief of Insolvent Persons.

smooth and equitable working. Hence yet another consolidation statute was passed in 1883 (Bankruptcy Act, 1883), which remained the principal statute till the present Bankruptcy Act, 1914, was passed. It was the 1883 Act which introduced the Board of Trade as an important factor in the Bankruptcy machinery. The Board (*inter alia*) appointed Official Receivers who undertook the management of the debtor's property pending the appointment of a trustee, and whose reports act as a guide to the Court and to the creditors in arriving at decisions upon adjudication and discharge. The Board also exercises important functions in the oversight of the trustees accounts (see *post*, p. 126).

Introduction of Receiving Orders.—The Act of 1883 also introduced the system of making a receiving order intermediate between adjudication and petition (see *post*, pp. 84-90), which considerably facilitates the examination of the debtor, and judicial compositions. Several other amendments, such as special provision for small bankruptcies and the administration of a deceased debtor's estates, were introduced. To enumerate all the provisions of this statute would, however, be merely anticipatory of the chapters that are to follow.

This does not close the list of statutes that preceded the Bankruptcy Acts of 1914 and 1926, and the Deeds of Arrangement Act, 1914 (1), but it is hoped that sufficient has been said to show the gradual growth of the law that is now consolidated in these three Acts, and something of the ideas behind it. It is conceived that further experience will provide yet further legislation, but an elementary textbook is designed rather to explain what exists than to suggest further amendment.

Summary of Principles.—From this summary of the history of the law certain fundamental characteristics and objects of bankruptcy emerge. These characteristics may, therefore, be enumerated briefly.

In the first place, it has been found necessary to prescribe a number of more or less arbitrary circumstances upon which proceedings to adjudicate an insolvent person bankrupt depend. These "acts of bankruptcy" are, in almost every case, indispensable to any action being taken,

(1) There was the Deeds of Arrangement Act, 1887, the Bankruptcy Act, 1890, and the Bankruptcy and Deeds of Arrangement Act, 1913.

and have consequently been frequently litigated. They do not, of course, arise where there is an extra-judicial composition with creditors, and mark one of the important distinctions between bankruptcy and insolvency as administered out of Court.

Secondly, an insolvent person, who is adjudged bankrupt, has forfeited his right to control the use of his property. It is to be taken from him, and vested in some third party who will be responsible for its administration. This entails elaborate provisions, both for the purpose of ascertaining what property the debtor has, and also what property is to be subject to the liability to pay his debts. It is this part of the law that probably requires the most careful consideration of the student, involving, as it does, setting aside transactions which are deemed to be fraudulent or unfair on creditors, and even rendering subject to debts of the bankrupt the property of a third party.

The third factor, which has been responsible for many sections of the later legislation, is the just distribution of the debtor's property among his creditors. Experience has shown that the acquisitive nature of man renders the individual likely to seek to save as much as he can for himself from the wreck without regard to the claims of others. Hence, the individual creditor must be prevented from taking any action to get for himself what he may of the debtor's property by means of judicial or extra-judicial process, as, for example, by distress or execution. Furthermore, the right to prove debts and the exercise of any security held by the creditor must be strictly controlled and regulated by rules designed to secure the creditors against unfair dealings. In this connection we use the word "unfair" to mean want of consideration for the rights of the whole body of creditors rather than to include any attempt to act fraudulently against individuals.

Finally, the different degree of blame that attaches to the insolvency of the debtor has led to complicated provisions for releasing him, and his future-acquired property, from the claims of his past debts by means of a discharge. Consequently, the conditions attaching to discharge vary considerably and are determined by the circumstances attending his bankruptcy and its administration. It is this release from past debts which is perhaps the most fundamental aspect of the whole law, since it

creates, as it were, a new man, stripped though he may have been of all his property. It is a statutory extinguishment of liabilities which the debtor might never have been able to meet.

It is in the light of these principles that the elaborate machinery of bankruptcy should be studied in order that what may at times appear almost chaotic may have a semblance of ordered reality. It can be seen that the principles themselves contain elements of conflict, such as the rights of the creditors and the right to a discharge. Some of the apparently complex provisions of the Bankruptcy Act are due to the attempt to reconcile these conflicting elements so far as is humanly possible.

It is because most insolvent persons will prefer to compound with their creditors rather than incur the stigma and loss of credit which results from bankruptcy proceedings that it has been thought fit first to treat of Deeds of Arrangement made out of Court. Normally, it is only where the debtor has tried to avail himself of this form of ridding himself of liability for debts, but has failed, that his insolvency results in bankruptcy. In saying this it should be remembered that a creditor, who has lost faith in his debtor, may sometimes avail himself of a bankruptcy petition as a means of compelling payment of his debt, without perhaps expecting that proceedings will be carried further. As will be seen hereafter (*post*, p. 24), this precipitancy on the part of a creditor may not result to his satisfaction, since he may well find that other creditors avail themselves of his initiative. A consequent forced realisation of assets, such as results from bankruptcy, may render insolvent a person who would have been solvent had he been allowed to carry on his business in the ordinary course. As a result the debtor may never be able to pay his creditors in full. The realisation that this is the case may be one of the many reasons which tend to the increasing popularity of the extra-judicial composition or arrangement under the Deeds of Arrangement Act, 1914.

CHAPTER I

DEEDS OF ARRANGEMENT

To avoid the embarrassment of adjudication as a bankrupt, it is not unusual to make an agreement with creditors. Sometimes this agreement or composition is made in the course of bankruptcy proceedings either to avoid adjudication or to have the adjudication set aside. Such compositions are subject to the special rules provided by the Bankruptcy Act (see *post*, p. 98) and are not to be confused with the provisions of the Deeds of Arrangement Act, 1914, which are the particular consideration of this chapter. An agreement falling within the Deeds of Arrangement Act, 1914, is made where no bankruptcy proceedings are in progress, but with a view to their prevention. The Act does not apply to deeds made by a limited company (a).

PRINCIPLES OF DEEDS OF ARRANGEMENT ACT

There is no rule of law which prevents a person in financial difficulties from making any agreement with his creditors for the payment of his debts. The legislature has, however, regarded such agreements as likely to produce hardship unless adequate provision is made for the protection of all creditors taking part in such an agreement or who may be affected by its contents. Three primary measures of protection have been adopted in the Deeds of Arrangement Act.

First, it has ensured publicity by the necessity of registration;

Secondly, it has provided for substantial agreement to the arrangement by the creditors because it will be *void* if not assented to by a majority of them both in number and value;

Thirdly, it protects the creditors from fraud upon the part of those carrying out the agreement by imposing certain duties upon the trustees of the deed.

The Nature of a Deed of Arrangement.—Before it is possible to consider these three principles it is necessary

(a) *Re Rileys, Ltd.*, [1903] 2 Ch. 590.

to ascertain the character of an instrument which will constitute a Deed of Arrangement for the purposes of the Act.

It must be

- (1) a written instrument;
- (2) for the benefit of creditors; *and*
- (3) an assignment or instrument giving control of the property to a third party.

(1) *A Written Instrument*.—Apparently any agreement to fall within the provisions of the Deeds of Arrangement Act, 1914, must be a written instrument.

In *Rimault v. Cartwright (b)*, SWIFT, J., at p. 493, said:

“That Act aims not at transactions, but at instruments.
“If transactions can lawfully be carried out without a document the Act leaves them untouched.”

The decision of SWIFT, J., was overruled by the Court of Appeal (c), but on other grounds. At the same time it is not necessary to have a formal instrument in any sense. For example, in *Re Halsted (d)*, a debtor was “hammered” under the rules of the Stock Exchange upon his written request and it was held that this constituted an assignment within the Deeds of Arrangement Act, 1914.

COZENS-HARDY, M.R., said, in that case, at p. 702 (citing Lord O’HAGAN in *Tomkins v. Saffery (e)*:

“The notice of the insolvent was spontaneous; given
“on no pressure; procured by no request; and involving
“the surrender of all his assets for the benefit of the specific
“class of creditors to whom it was addressed. . . . He
“could not more effectually, with a view of bankruptcy, have
“yielded up that estate if he had assigned every portion
“of it by a formal conveyance.”

And at p. 703:

“But it remains to consider whether this *cessio bonorum*
“is within the Act. In the first place, the Act only applies
“to an instrument; it would have no bearing upon a verbal
“*cessio bonorum*. This raises the critical point in the present
“case. It is said that the request by the bankrupt had no
“operation until the committee acting upon the request
“declared him a defaulter, and the argument is put even

(b) (1924), 93 L. J. K. B. 491.

(d) [1917] 1 K. B. 695.

(c) (1924), 93 L. J. K. B. 823.

(e) (1877), 3 App. Cas. 213.

"higher, and it is contended that the declaration must be "perfected by the customary process of hammering, namely, "by the announcement in the Stock Exchange by two waiters "of the fact of the declaration. In my opinion this contention "cannot prevail. A deed of assignment does not become fully "operative until it is delivered by the grantor, but the property "does not pass by the mere act of delivery by the grantor; still "less can it pass by the 'hammering' by two waiters on the "floor of the Stock Exchange. Moreover, in the present case "the *cessio bonorum* was not by deed but by letter only. The "observations in *Tomkins v. Saffery* to which I have referred, "though dicta, treat the request as an operative creation of the "*cessio bonorum*. In the present case the hammering, in the "full sense, was complete on the same day as the request, and "I see no reason for the distinction which is sought to be made "on this point."

It will be observed that if the member had been declared a defaulter at a creditor's request the question is still an open one, since stress was laid on the letter of request written by the debtor as the instrument. If the debtor had debts beyond his Stock Exchange creditors, however, to be hammered at his own request would probably be a fraudulent preference (see *post*, p. 57), because under the Stock Exchange rules the whole of his property vests in an assignee for the benefit of his Stock Exchange creditors.

(2) *For the Benefit of Creditors.*—An instrument will only fall within the Act by virtue of s. 1 (1) if it is either

- (i) For the benefit of creditors generally; or
- (ii) For the benefit of three or more creditors *if at the date of execution the debtor was insolvent.*

(i) Whether an instrument is for the benefit of creditors generally is a question of fact to be decided upon the circumstances of each case. It is not necessary that the instrument should expressly state that it is for the benefit of creditors.

In the case of *Re Allia (f)*, the document contained a schedule in which not all the creditors were mentioned. These creditors had never, indeed, attended a meeting of creditors summoned by the debtor's solicitor, nor had they assented to the assignment. HORRIDGE, J., held that there was nothing to exclude them if they chose to come in, and that on the whole facts it was for the benefit of creditors generally.

(f) [1914] 2 K. B. 77.

The principle governing the decision in such cases is laid down in *Re Saumarez* (g), where, however, the Court came to a different conclusion. In that case COZENS-HARDY, M.R., at p. 175, said:

"the definition clause seems to me to mean no more than this, "that a deed which in one sense might not be for the benefit of "all the creditors, because, to take the commonest case, it "might fix a limit of time within which the creditors were to "come in, may yet be a deed for the benefit of creditors generally, "inasmuch as it gives an option to all the creditors to assent "and take the benefit of it, although in all the events that have "happened, by reason of delay or otherwise, all the creditors "did not in fact come in."

(ii) The principal reason for the second provision is that any agreement with creditors generally complies with the Act, although the debtor be solvent. When, however, he is insolvent, if an agreement is come to with three or more creditors it will be within the Act though not for the benefit of creditors generally. In order, however, to set aside such an instrument it will first be necessary to prove that the debtor was insolvent at the date of its execution, and this may not always be easy. If, therefore, the debtor is anxious to carry on, but has several very pressing creditors, it behoves him, if possible, to arrange with them individually, and not collectively, so as to prevent any question arising in connection with this Act.

(3) *An Assignment or Instrument giving Control of Property to a Third Party*.—Provided that the agreement falls into one of two classes mentioned in s. 1 (1), it must yet be an instrument as defined by sub-section 2 of this section, namely, either

- (i) An assignment of property; or
- (ii) A deed or agreement for a composition; or
- (iii) The creditors must obtain some control over the debtor's property, and the instrument be either
 - (a) A deed of insolvency entered into for the purpose of carrying on or winding up a business;
 - (b) a letter of licence authorising the person to manage, carry on, realise, or dispose of a business with a view to the payment of debts; or

- (c) any agreement or instrument entered into for the purpose of carrying on or winding up the debtor's business or authorising the debtor or any other person to manage, carry on, realise, or dispose of the debtor's business with a view to the payment of his debts.

With respect to the last class of cases there is very little possible difficulty since they involve two things, namely, a control of the business together with a duty to carry it on, etc., for the payment of debts. In determining these circumstances much doubt cannot exist.

Assignment of Property.—What will amount to an assignment of property has been the subject of litigation. In the case of *Lipton (B.), Ltd. v. Bell (h)*, where a debtor wrote a letter to the secretary of a trader's association as follows:

"I hereby authorise you to realise my estate including stock-in-trade, book debts, furniture, and all other assets and to apply the proceeds first in payment of the costs, charges, and preferential claims, and, secondly, to pay the balance to any creditors *pro rata*."

It was argued that this document constituted a deed of arrangement either under the first class or the third class, head (a) above. The Divisional Court held that it was an assignment of property, but the Court of Appeal reversed this decision. With regard to the argument that it was a licence to carry on and wind up the business, this was dismissed on the ground that there was no evidence that the creditors obtained any control of the business. The Court then held that this instrument was merely a mandate, that is, an authority to an agent to get in the property for the benefit of the creditors, and that they were bound to follow the principles laid down in *Re Spackman (i)*, as explained in *Re Hughes (k)*, and to decide that it did not constitute an assignment for this purpose. In so doing they were applying authorities which were decided for the purpose of bankruptcy law, but they held that the close relation between bankruptcy and deeds of arrangement rendered those authorities binding on them. The earlier cases had decided that the words "assignment" or "conveyance" must be construed in a strict sense.

(h) [1924] 1 K. B. 701.

(k) [1893] 1 Q. B. 595.

(i) (1890), 24 Q. B. D. 728.

In *Re Spackman* (l), FRY, L.J., had said:

"Having regard to the language used, it seems clear to me
 "that the legislature must have had in their minds the fact
 "that there are other modes of disposition by which property
 "may be rendered subject to be applied for the benefit of
 "creditors, besides a conveyance or assignment in the proper
 "sense of those terms. The debtor himself might declare
 "himself to be a trustee of his property for the benefit of
 "creditors. Such a mode of disposing of property is well known
 "to the law; but it is not an assignment in the proper sense of
 "the term."

This view was, however, explained, if not modified, in the case of *Re Hughes* (m), where a declaration of trust of a leasehold (n) subject to onerous covenants was held to fall within the description of "conveyance or assignment." In this case LOPES, L.J., said:

"I think they (*i.e.* the words 'conveyance' or 'assignment')
 "ought to be construed with reference to the particular property
 "to be dealt with, and by light of the language and practice of
 "conveyancers."

And in the same case LINDLEY, L.J., held that the words were

"to be construed as extending to and as including the various
 "methods of dealing with such property to which conveyancers
 "usually have recourse, although such methods are not conveyances or assignments in the proper sense of those terms."

This modification was justified in *Lipton v. Bell* (*supra*), by BANKES, L.J. (at p. 710), who said:

"In my view that case (*Re Hughes*) really confirms *Spackman's Case*. No doubt it explains that some of the language in "*Spackman's Case* would be inapplicable where the only practicable method of assignment is by way of a declaration of trust, where, for example, it is sought to assign leasehold property charged with onerous covenants where no trustee for creditors could be found to accept an assignment."

Subject, then, to the limitation just referred to, it seems clear that to fall within s. 1, sub-s. (2), class (i), it is necessary to have the normal form of transfer by way of conveyance

(l) (1890), 24 Q. B. D. 728, at p. 740. (m) [1893] 1 Q. B. 595.

(n) A declaration of trust of this character is sometimes used to avoid forfeiture where there is a covenant against assignment in the lease.

or assignment applicable to the particular form of property to be made available to pay debts. It should, however, be remarked in passing that the learned judges of the Court of Appeal, in *Lipton v. Bell* (*supra*), expressly remarked that they had not to decide whether such an instrument as that before them did not come within class (ii) as a deed of or agreement for a composition, since the point was not before them. It is possible that this would be so held, for BANKES, L.J., at p. 707, remarked:

"It might be urged with great force that this instrument
"was a deed of or agreement for a composition."

In connection with this provision of the Act it is also necessary to note that a conveyance or assignment will not become effective until creditors are notified of its existence (o). The trustee will take no title under the document until its contents have been communicated. The reason for this decision is to be found in the case of *Garrard v. Lauderdale* (p), where the principle was explained. BROUGHAM, L.C., laid down this principle at p. 455:

"Upon the principle laid down in *Ellison v. Ellison* (6 Ves. 656)
"it is clear that no particular form of words is necessary to
"constitute a trust; but I take the real nature of this deed to be
"like that in *Wallwyn v. Coutts* (3 Sim. 14), not so much a
"conveyance vesting a trust in it for the benefit of the creditors
"of the grantor, but rather that it may be likened to an arrange-
"ment made by a debtor for his own personal convenience and
"accommodation—for the payment of his debts in an order
"prescribed by himself—over which he retains power and
"control and with respect to which the creditors can have no
"right to complain, inasmuch as they are not injured by it, they
"waive no right of action, and are not executing parties to it."

Of course, once the deed is communicated it is impossible to say that no creditors may not have at least held their hand to consider it, and that thereby they may have injured themselves.

1.—PUBLICITY BY REGISTRATION

Requirements of Registration.—To return to the principles fundamental to the Deeds of Arrangement Act mentioned at the commencement of this chapter, it is now necessary to

(o) *Ellis & Co. v. Cross*, [1915] 2 K. B. 654. (p) (1831), 2 My. & Russ. 451.

observe how publicity is obtained by registration. It is necessary to register a deed of arrangement within seven clear days of its first execution by the debtor or any creditor, and it must be stamped with an *ad valorem* deed stamp under s. 2 of the Act. Failure to register within the requisite time will render the deed *void* (*ibid.*).

If the deed is executed out of England the time for registration is seven clear days after receipt in England if it was posted within seven clear days of execution (Deeds of Arrangement Act, s. 2).

The instrument need not be executed by the debtor himself, but it is sufficient to give a power of attorney to enable another to do so. In *Re Wilson* (q), a debtor on military service in France executed a power of attorney to this effect and it was held to be sufficient. The donee of a power of attorney cannot make the affidavit in compliance with the Deeds of Arrangement Act, s. 5 (1), which has to be filed with the instrument (qq).

The registration is made with the Registrar of the Board of Trade, and before registration must be executed by the trustee or assignee (Deeds of Arrangement Rules, r. 7). The deed must be accompanied by an affidavit, verifying the time of execution, and containing a description of the residence and occupation of the debtor and of his place or places of business, and also an affidavit by the debtor stating the total amount of his property and liabilities, the estimated amount of the composition, and the names and addresses of the creditors (Deeds of Arrangement Act, s. 5 [1]).

Extension of Time.—The High Court or a judge thereof may make an order extending the time for registration or rectify any omission or misstatement on the application of any person interested, provided that it is shown that the default was accidental or due to inadvertence or to some cause beyond the control of the *debtor* and not imputable to any negligence on his part (Deeds of Arrangement Act, s. 7).

Deed of Arrangement Affecting Land.—Furthermore, if the deed of arrangement affects land it will be void as against a purchaser of the land unless it is registered in the Land Registry under the Land Charges Act, 1925, s. 8. This registration will have to be renewed every five years should the deed

(q) [1916] 1 K. B. 695.

(qq) *Re Wilson*, *supra*.

of arrangement be subsisting for the period. Where the land is registered land under the Land Registration Act, 1925, for registration as a land charge will be substituted the registration of "a creditor's notice, bankruptcy inhibition, or a caution against dealings with the land" (Land Registration Act, 1925, s. 59 [1]).

2.—ASSENT OF CREDITORS

Assent of Majority in Number and Value.—Where the deed of arrangement is for the benefit of creditors *generally* it will be void, if within twenty-one days after registration a majority in number and value of the creditors have not signified their assent to the deed (Deeds of Arrangement Act, s. 3). Notice of their assent may be effected either by executing the deed or by giving written notice to the trustee.

Statutory Declaration of Trustee.—The trustee must within twenty-eight days of registration file a statutory declaration of the assent of the creditors which, in favour of a purchaser, will be conclusive, and in other cases *prima facie*, evidence of the fact. The schedule of creditors annexed to the affidavit shall be *prima facie* evidence of their names and the amounts of their debts. Secured creditors are to be treated as creditors only in respect of the balance of their claim after deducting their security, and creditors for amounts not exceeding £10 are not to be reckoned in the majority in number. In *Re Wilson's Deed* (7), the Divisional Court held that this was to exclude them altogether in reckoning the majority in number, and not merely to prevent them from voting.

The time for filing the statutory declaration may be extended by the High Court or the County Court in which the debtor resides or carries on business (Deeds of Arrangement Rules, r. 16).

The provisions making it necessary for the assent in writing only concerns the validity of the deed and must not be confused with the cases where an assent can be implied from conduct which may estop a creditor from taking proceedings adverse to the deed.

(7) [1916] 1 K. B. 382. Their decision in this respect is not binding, because the Court of Appeal decided that they had no jurisdiction on the facts of the case to entertain the matter at all.

The importance of this aspect of an assent by the creditors is due to the fact that a deed of arrangement, if it is substantially of the whole of the debtor's property, is an act of bankruptcy, and hence upon it a petition in bankruptcy can be founded (see *post*, p. 48). In order to prevent unnecessary delay in proceeding with a deed of arrangement which might be avoided by a receiving order under the doctrine of Relation Back (see *post*, p. 131), the Deeds of Arrangement Act, s. 24 (1), provides that

a trustee may serve a notice upon the creditors of the execution of the deed and of the filing of the statutory declaration, and if they do not within one month therefrom issue a petition they cannot do so unless the deed becomes void.

Creditor Estopped by Conduct.—Apart, however, from the provision just mentioned, a creditor, who has not assented to the deed, may by his conduct debar himself from proceeding under the Bankruptcy Act, 1914, and treating it as an act of bankruptcy. The principle is clearly laid down by VAUGHAN WILLIAMS, L.J., in *Re Brindley* (s):

"If a man treats a deed as being an honest deed which cannot be impeached, and, so treating it, takes an advantage under it, it is impossible that he should ever be allowed afterwards to say that a person taking under that deed has no title. That is the principle upon which all the cases proceed, beginning with *Ex p. Alsop* (t), and going on with *Ex p. Stray* (u). Now, in the present case, what was it that Messrs. Taylor did which amounted to a recognition that this deed conferred a good title upon the trustee so as to preclude them from saying that the deed was a fraud on creditors? In the first place they accepted an order from the trustee under that deed for a supply of timber and received payment by a cheque from him; in doing that they clearly recognised the title of the trustee. They had no right to accept that money if their intention was afterwards to dispute the trustee's title."

This case was applied to the facts and followed in *Re A Debtor; Ex p. Newburys* (v), where the creditors made further inquiries and then stood by for fourteen days, and it was held that they were estopped. The principle has recently been re-enunciated in *Re A Debtor* (w), where a creditor attended a

(s) [1906] 1 K. B. 377, at p. 384. (t) (1859) 1 D. & S. 289.

(u) (1861), L. R. 2 Ch. 374.

(v) (1926), 95 L. J. Ch. 199.

(w) [1936] 1 Ch. 165 This case was followed in *Re A Debtor* (1938), 107 L. J. Ch. 310.

meeting summoned by the debtor, proposed an amendment, which was not carried, to a motion, was elected a member of the committee of inspection without apparent dissent on his part, but at the end of the meeting refused to sign the deed of arrangement and never acted on the committee of inspection. CLANSON, J., held that the creditor was estopped and said (at p. 170): "I should . . . rely on s. 5 (3) of the Bankruptcy Act, 1914, which enables the Court to dismiss the petition if it is satisfied that for some sufficient cause no order ought to be made, and hold that having regard to the well-settled practice during the last seventy years since the case of *ex p. Stray* (x), it is sufficient cause for refusing to make an order granting the petitioning creditor relief on the ground of the deed having been executed, that it appears that the petitioning creditor was himself a participator or sharer in bringing the deed into existence."

The principle, therefore, is sufficiently simple, but its application is not without difficulty. This is well illustrated by the case of *Re Wilson* (xx), the facts in which were peculiar, but the Court of Appeal held that there was no estoppel. In that case a deed of arrangement had been executed by an attorney for the debtor, and a creditor gave a written assent. The debtor subsequently applied for a declaration that the deed was invalid as executed by attorney, but this application was refused in *Re Wilson's Deed* (y). The creditor then filed a bankruptcy petition, and the Court of Appeal held that the creditor was not estopped by his assent to the deed nor had he done anything to prevent the debtor from paying his debt. This decision must be regarded as turning upon its peculiar facts (yy). The question of estoppel was again raised in the case of *Re Lee* (z),

where for many years a creditor had received money paid in respect of debts under an arrangement to which he had been a party which it had been agreed should not be registered and so was in fact void. After the death of the debtor the creditor sought to recover against the trustee of the arrangement in respect of moneys still in his hands in an administration order made under Bankruptcy Act, s. 130 (see *post*, p. 323).

(x) (1867), L. R. 2 Ch. 374, 378. (xx) [1916] H. B. R. 70.

(y) [1916] 1 K. B. 382.

(yy) The difficulty is not lessened by the dissenting judgment of Phillimore, L.J., at p. 79.

(z) [1920] 2 K. B. 200.

HORRIDGE, J., at p. 211, said this: "It was also contended on behalf of the applicant that the debtor would have been estopped from saying that the money was not to be applied in favour of the creditors. The only right to apply it in favour of the creditors and the only direction given was by the void deed; and until the money was paid over, and the payment had been ratified by the debtor, in my view he (the debtor) would have been entitled at any moment to ask for it back (distinguishing *Runtz v. Longbourne*, 8 T. L. R. 568, on the ground that there the money had been impressed with a verbal trust independently of the void deed). It is not like *Re Wilson*, [1916] 1 K.B. 382, or *Roe v. Mutual Loan Fund*, 19 Q.B.D. 347. I held in *Re Wilson* and the Court of Appeal decided in *Roe v. Mutual Loan Fund* that a person who had relied on an invalid deed, and had set it up so as to obtain the benefit of it, could not afterwards go back upon it and allege that it was invalid. But the distinction between those cases and the present one is that in the present case all parties knew that this deed was invalid. That was the assumption from the very first; and the provision was expressly inserted in the document that it should not be registered under the Deeds of Arrangement Act, 1887. I therefore think that this was a deed of arrangement; that the moneys in the hands of the trustee were repayable when demanded either by the debtor or the official receiver under the administration decree; and that there was nothing done which estopped either the debtor or the official receiver from claiming the moneys," though on the facts of the case he held the debt to be statute-barred.

In *Re A Bankruptcy Notice (a)*, on somewhat similar facts the case of *Re Lee* was discussed and explained. It would appear from the judgments that the mere assent to a void deed would not constitute estoppel, but there must be combined with it a definite setting up of the deed as valid.

In any event, no estoppel will arise where there has been a misrepresentation inducing the creditor to assent (*b*). Furthermore, a creditor may present a petition founded upon an independent act of bankruptcy (*c*).

In *Re Mills (d)* a creditor, who had expressly refused to consent to the deed, was alleged to have proposed the trustee, and this was treated as estoppel for the purposes of making it

(a) [1924] 3 Ch. 76.

(c) *Re Mills*, [1906] 1 K. B. 389.

(b) *Re Tanenberg* (1889), 6 Mor. 49.

(d) *Re Mills*, [1906] 1 K. B. 389.

an act of bankruptcy, though the decision was not made on this point. It was, however, held that he was not bound by the deed, since he refused to consent to it, and hence, *per* VAUGHAN WILLIAMS, L.J., at p. 892: 'if he is not bound by the deed "there is nothing to prevent him from recovering any debt due "to him in any way that he legally can, and therefore, in my "judgment, there was nothing to prevent him from presenting "a bankruptcy petition founded upon some independent act of "bankruptcy."

But in this connection it should be noted that the act relied upon in the petition must be completely independent of the deed. The assenting creditor cannot rely on a circular calling a meeting of creditors to consider if the deed, which ultimately was executed, should be executed (*e*), or a circular stating that a deed had been executed and asking the creditors to assent thereto (*f*), as a notice that he has or is about to suspend payment of his debts so as to be an independent act of bankruptcy under s. 1 (1) (b) of the Bankruptcy Act, 1914. This principle was accepted and followed in *Re Sunderland* (*g*).

It should here be pointed out that the doctrine of estoppel is not concerned only with deeds for the benefit of creditors generally, at least in terms. In the cases discussed the invalidity has in most cases arisen from non-registration, and not from want of adequate consent, and hence this branch of the subject must be carefully distinguished from what had previously been said respecting assents. This may be particularly noted in connection with the Deeds of Arrangement Act, s. 24 (2), which provides that, where a deed is for the benefit of creditors generally, but is void, the fact that the creditor has assented to the deed shall not disentitle him to present a bankruptcy petition. It is submitted that the case here contemplated is simply the assent necessary to give validity to the deed under s. 3 of the Act, and has no relation to estoppel by conduct of the creditor.

3.—PROTECTION OF CREDITORS

Statutory Obligations of Trustee.—The protection of the creditors against acts of the trustee is principally ensured by provisions for the trustee

(1) To give security;

(*e*) *Re Hawley* (1897), 4 Mans. 41.
(*g*) [1911] 2 K. B. 658.

(*f*) *Re Woodroff* (1897), 4 Mans. 46.

- (2) To render accounts to the Board of Trade and to creditors, and submit those accounts for audit; and
- (3) Not to make preferential payments.

(1) *To give Security.*—The Deeds of Arrangement Act, s. 11, lays down the rules governing the security to be given by the trustee. It will not be necessary where it is dispensed with by a resolution of a meeting of creditors or by written notice to the trustee of a majority in number and value of the creditors. In the majority in number creditors for debts not exceeding £10 are not to be included. Otherwise the trustee must give security to the value of the estimated assets for the payment of unsecured creditors to the Registrar of the Court having bankruptcy jurisdiction in the place where the debtor resides. The security must be given within seven days of the filing of the statutory declaration of assent by creditors by a guarantee society (Deeds of Arrangement Rules, r. 24). Provision is made by the Rules for the acceptance of a cover note prior to the preparation of the guarantee. A certificate that such security has been given will be rendered by the Registrar of the Court to the Registrar of the Board of Trade within three days (Deeds of Arrangement Rules, r. 26). Failure to give such security enables the Court on the application of any creditor either to set aside the deed or to appoint a new trustee.

This provision for security by the trustee, however, does not apply to deeds for the benefit of three or more creditors unless in fact they are for the benefit of creditors generally (Deeds of Arrangement Act, s. 22).

(2) *Rendering Accounts.*—By the Deeds of Arrangement Act, s. 13, the trustee is bound to render accounts to the Board of Trade.

Under the Deeds of Arrangement Rules, r. 31, the accounts must be rendered for periods of twelve months, dating from registration of the deed, verified by affidavit, and transmitted within thirty days of the expiration of the period.

Under r. 33, where the trustee carries on a business an account must be separately returned in respect of the trading.

These accounts are open to the inspection of the debtor and of creditors, but by the Deeds of Arrangement Act, s. 14, every assenting creditor is entitled to receive a statement of accounts from the trustee every six months, while the trustee must affirm that this has been done in his affidavit to the Board of Trade. Failure to do either of these things will enable the

High Court to order them to be done and to make a committal order in default; the penalty in respect of the first duty is liability to a fine not exceeding £5 a day during default.

Furthermore, at any time during the course of administration and within twelve months of the final account rendered to the Board of Trade, a majority in number and value of the creditors may make application for an official audit. The Board of Trade may cause the accounts to be audited and decide incidental questions, such as expenses and costs (Deeds of Arrangement Act, s. 15). This provision also does not appear to affect cases except where the deed is, in fact, for the benefit of creditors generally (Deeds of Arrangement Act, s. 22).

(3) *Not to Make Preferential Payments.*—To avoid the possibility of discrimination between creditors by the trustee it is a criminal offence to make preferential payments. Unless the deed authorises him to do so, or unless payments are made to a creditor entitled to enforce his claim by distress or would be lawful if made in bankruptcy, the trustee will be guilty of a misdemeanour if he pays to a creditor a sum larger in proportion to the creditor's claim than that paid to other creditors (Deeds of Arrangement Act, s. 17).

DUTIES OF TRUSTEES

Trustees Governed by General Law.—For the rest, the duties and powers of a trustee under a valid deed will be practically provided by the deed and the general law. It will be usual for the property to be conveyed to the trustee (as has been shown above) upon trust for sale, but the necessity for two trustees to deal with land required by the new property legislation does not apply to this case (Law of Property (Amendment) Act, 1926, s. 3).

Again, appointments of new trustees will be made under the Trustee Act, 1925, and power to appoint new trustees wherever it is difficult, inexpedient, or unpracticable is expressly vested in the Court under the Trustee Act, 1925, ss. 40 and 41, repealing Deeds of Arrangement Act, s. 18.

When a new trustee has been appointed he must forthwith send notice of his appointment to the Registrar of the Board of Trade showing how and when the appointment was made (r. 27 of the Deeds of Arrangement Rules).

Money that the trustee has received must be paid into a

special account opened in the name of the debtor's estate (Deeds of Arrangement Act, s. 11 (4)).

Duties where the Deed has become Void.—Further provision, however, is manifestly necessary in case the deed for any reason has become void. It is apparent that this may occur for various reasons; for example, non-registration, receiving order made within three months of the execution of the deed, or on the deed being set aside for failure on the part of the trustee to give security. Wherever a deed of arrangement is void for any reason other than that a deed for the benefit of creditors generally has not been registered, the trustee must, as soon as practicable after he becomes aware that the deed is void, give written notice to each creditor of whom he knows, and file a copy of the notice with the Registrar of the Board of Trade (Deeds of Arrangement Act, s. 20). Failure to do so involves a fine not exceeding £20.

Furthermore, s. 12 of the Act renders a trustee liable to a fine of not exceeding £5 a day for acting under a void deed, unless he can show that he was acting inadvertently or simply to protect the debtor's property, provided that either

- (1) It was to his knowledge void for non-compliance with the Act; or
- (2) He failed to give security.

It must have appeared from the judgment in *Re Lee* (*ante*, p. 25) that a trustee, who acts under a void deed, does so at considerable risk.

An example of this may be found in *Re Prigoshen* (*h*), in which the trustee under the deed let the debtor recover assets which had been assigned to him. The Court held that, though a majority of creditors might have sanctioned this course, this was an action void against a trustee in bankruptcy, who could recover against the trustee for the loss to the estate, because the deed became void (*i*).

(*h*) [1912] 2 K. B. 494.

(*i*) In *Re Simms*, [1934] 1 Ch. 1, a somewhat similar position arose out of a receiver appointed by debenture holders of a company. The debtor, who was subsequently adjudicated bankrupt, made a fraudulent transfer of his business in return for shares to a company. The debenture holders appointed a receiver who converted the chattels. Since the transfer was fraudulent it was set aside in favour of the trustee in bankruptcy and the property was then deemed to have vested in him (see *post*, p. 207). The trustee then elected to treat the receiver as a trespasser and was entitled to recover such damages as were the natural and direct result of the tort.

Protection of Trustee under a Void Deed.—Certain protection has, however, been provided¹ for the trustee by the Act.

In the first place, if a deed becomes void by reason of the bankruptcy of the debtor, the expenses of the trustee shall be a first charge on the estate, and be paid to him by the trustee in the bankruptcy (*k*).

It would, however, seem that these expenses are confined to those incurred in complying with the provisions of the Act (*l*), and hence it would be unwise for the trustee to undertake too much while the possibility of bankruptcy remains.

In this connection it may be well to remind readers that a deed of arrangement for the benefit of creditors is an act of bankruptcy (see *post*, p. 48) and that it will fall within any bankruptcy in which the petition is filed within three months under the doctrine of Relation Back (see *post*, p. 131).

In the second place, where a deed is void either for want of the requisite majority in assenting to creditors, or where a deed is for the benefit of three or more creditors and the debtor was insolvent, it had not been registered, then the trustee will not be liable in respect of any dealings which would have been good had the deed not been invalid in the case where a receiving order is made against the debtor (Deeds of Arrangement Act, s. 19 (1)).

This protection is notably narrow, since it will only apply where the debtor is made bankrupt on a petition presented within three months of the execution of the deed, unless the receiving order is made under Bankruptcy Act, s. 107 (4) (*post*, p. 327), where the protection will apply even if the receiving order is made after the lapse of three months (Deeds of Arrangement Act, s. 19 (2)).

From this it will be seen that, apart from conferring ample powers on a trustee, the deed of arrangement, if wisely drawn, must make provision for an indemnity by the assenting creditors for all acts properly done by him in the course of administration.

Courts Having Jurisdiction.—Where the deed of arrangement is for the benefit of creditors generally, applications by the trustee, the debtor, or any creditor entitled to benefit, for the enforcement of the deed, or for the determination of questions arising under it, will be made to the Court having

(*k*) Deeds of Arrangement Act, s. 21. (*l*) *Re Geen*, [1917] 1 K. B. 183.

jurisdiction in bankruptcy (see *post*, p. 33) in the district in which the debtor resided, or carried on business, at the date of the execution of the deed (*m*). The question whether a creditor is entitled to get the benefit may be determined either by such Court or the High Court (*ibid.*).

It is to be observed that this section does not cover questions affecting the validity of the deed itself, so that an application for a declaration that the deed is void on the ground that it did not comply with the Act would not be within the section (*n*).

(*m*) Deeds of Arrangement Act, s. 23. (*n*) *Re Wilson*, [1916] 1 K. B. 382.

CHAPTER 2

COURTS HAVING JURISDICTION IN BANKRUPTCY

THE Courts having original as distinct from appellate jurisdiction in bankruptcy are:

- (1) The High Court; and
- (2) The County Courts, except those whose jurisdiction in bankruptcy has been excluded by order of the Lord Chancellor (*a*) and, unlike other proceedings, the jurisdiction in bankruptcy, subject to the minor exceptions noted in this chapter, and the proceedings are essentially the same as in the High Court.

In what Court should Proceedings be Taken.—If the debtor by or against whom a bankruptcy petition is presented has resided or carried on business within the London bankruptcy district for the greater part of the six months immediately preceding the presentation of the petition, or for a longer period during those six months than in any County Court district, or is not resident in England, or if the petitioning creditor is unable to ascertain the residence of the debtor, the petition shall be presented to the High Court (*b*).

The London bankruptcy district consists of the City of London and the liberties thereof, and the County Court districts of Bloomsbury, Bow, Brompton, Clerkenwell, Lambeth, Marylebone, Shoreditch, Southwark, Westminster, and Whitechapel (*c*).

In any other case the petition should be presented to the County Court for the district in which the debtor has resided or carried on business for the longest period during the six months immediately preceding the presentation of the petition (*d*).

These provisions do not invalidate any proceeding by reason of its being taken in a wrong Court (*e*).

(*a*) B.A. s. 96.

(*c*) B.A. s. 99 and 3rd Sched.

(*e*) B.A. s. 98 (3).

(*b*) B.A. s. 98 (1).

(*d*) B.A. s. 98 (2).

Retention or Transfer.—By s. 100 (2) any proceedings in bankruptcy may at any time, and at any stage thereof, and either with or without application from any of the parties thereto, be transferred by the judge of the Court in which they were begun or by a High Court (f) bankruptcy judge (g), and in the prescribed manner from one Court to another Court, or may by the like authority be retained in the Court in which the proceedings were commenced, although it may not be the Court in which the proceedings ought to have been initiated; but, unless and until a transfer is made under the bankruptcy rules, the proceeding continue in the Court in which it was commenced; and Bankruptcy Rules 18 and 19 prescribe that a bankruptcy judge of the High Court may at any time, for good cause shown, order the proceeding in any matter under the Act to be transferred from a County Court to the High Court or from the High Court to a County Court, and the judge of any County Court having bankruptcy jurisdiction may, at any time, for good cause shown, order such proceedings which have been commenced or are pending in his Court to be transferred to any other County Court having jurisdiction in bankruptcy.

Case Stated.—If any question of law arises in any bankruptcy proceeding in a County Court which all parties to the proceeding desire, or which one of them and the judge of the County Court desire, to have determined in the first instance in the High Court, the judge shall state the facts in the form of a special case for the opinion of the High Court. The special case and the proceedings, or such of them as may be required, are then transmitted to the High Court for determination (h).

WHAT MUST BE HEARD IN OPEN COURT.

The following matters and applications must by the Act or Rules be heard and determined in open Court:

- (1) The public examination of debtors (i).
- (2) Applications to approve a composition or scheme of arrangement (k).

(f) B.R. 24.

(g) Bankruptcy business is assigned to two judges of the Chancery Division; in vacation or during their illness it may be transacted by the judge for the time being in King's Bench Chambers.

(h) B.A. s. 100 (3).

(i) B.A. s. 15 and B.R. 6 (a).

(k) B.R. 6 (b).

- (3) Applications for orders of discharge, except any unopposed application which the Court may direct to be heard in chambers, and applications for certificates that the bankruptcy was caused by misfortune without misconduct by the debtor under s. 26 (4) of the Act (*l*).
- (4) Appeals from the Board of Trade to the High Court (*m*).
- (5) Applications to set aside or avoid any settlement, conveyance, transfer, security, or payment, or to declare for or against the title of the trustee to any property adversely claimed (*n*).
- (6) Applications for the committal of any person to prison for contempt (*o*).
- (7) Appeals against the rejection of a proof, or applications to expunge or reduce a proof, where the amount in dispute exceeds £200 (*p*).
- (8) Applications for the trial of issues of fact with a jury, and the trial of such issues (*q*).

Any other matter or application may be heard and determined in chambers.

Adjournment from Court to Chambers and vice-versa.—Any matter may at any time, if the judge (or, as the case may be, the registrar) thinks fit, be adjourned from chambers to Court or from Court to chambers; and if all the contending parties require any matter to be adjourned from chambers to Court it shall be so adjourned (*qq*).

Jurisdiction of Registrars.—Some of the above matters that must be heard in open Court are dealt with by the judge and others by the registrar. The powers of the High Court and County Court registrars are not quite the same. The actual jurisdiction is given to the registrars of both the High Court and the County Court by s. 102, but by B.R. 7 its exercise is subject to any general or special direction of the judge of the Court concerned. The jurisdiction of High Court registrars has been curtailed by the general directions of Mr. Justice CAVE, dated January 1, 1884, and March 25, 1885.

(*l*) B.A. s. 26 and B.R. 6 (c).

(*n*) B.R. 6 (e).

(*p*) B.R. 6 (g).

(*qq*) B.R. 9.

(*m*) B.R. 6 (d).

(*o*) B.R. 6 (f).

(*q*) B.R. 6 (h).

By s. 102 (2) a registrar of either the High Court or the County Court shall have power

- (i) To hear bankruptcy petitions, and to make receiving orders and adjudications thereon.
- (ii) To hold public examinations of debtor.
To grant orders of discharge where the application is not opposed. (If the Official Receiver reports to the Court any fact, matter, or circumstance which would justify the Court in refusing an unconditional order of discharge (*r*), it will be deemed an opposed application within the meaning of this sub-section (*s*)).
- (iii) To approve compositions or schemes of arrangement where they are not opposed.
(If the Official Receiver reports to the Court any fact, matter, or circumstance that would justify the Court in refusing to approve the scheme or composition (*t*) it will be deemed to be an opposed application within the meaning of this sub-section (*u*).)
- (iv) To make interim orders in cases of urgency.
- (v) To make any order or exercise any jurisdiction which by any rule in that behalf is prescribed as proper to be made or exercised in chambers.
- (vi) To hear and determine any unopposed or *ex parte* application.
- (vii) To summon and examine any person known or suspected to have in his possession effects of the debtor or to be indebted to him, or capable of giving information respecting the debtor, his dealings, or property.

The High Court registrars shall also have power to grant orders of discharge and certificates of removal of disqualifications, and to approve compositions and schemes of arrangement (*v*).

A registrar has no power to commit for contempt of Court (*w*).

The Lord Chancellor may by order direct that any specified

(*r*) See *post*, pp. 298, 299.

(*t*) See *post*, pp. 298, 299.

(*v*) B.A. s. 102 (3).

(*s*) B.R. 228.

(*u*) B.R. 204.

(*w*) B.A. s. 102 (4).

registrar of a County Court shall have and exercise all the powers of a bankruptcy registrar of the High Court (x).

Mr. Justice CAVE, in the general directions referred to above, directed, in terms that refer only to the High Court registrars, that of the matters that must be heard and determined in open Court the High Court registrars shall deal with the following.

- (1) The public examination of debtors.
- (2) Applications to approve a composition or scheme of arrangement.
- (3) Applications for orders of discharge or certificates of disqualification.

Applications to be heard by the Judge.—The above are all the matters that by s. 102 a High Court registrar is empowered to determine, and that, also by the Act and Rules must be heard in open Court; the other five are therefore heard by the judge. It will have been noticed that only eight matters must be heard in open Court, and that all others can be determined in chambers, and therefore by s. 102 (2) (f) can, unless limited by direction, be heard by registrars, but, by the same directions of Mr. Justice CAVE, the following have been excepted from the jurisdiction of High Court registrars and are therefore heard by the judge:

- (i) Applications by a creditor for leave to commence any action or other legal proceedings under s. 7 (y).
- (ii) Deciding on the validity of an objection by the Board of Trade to the appointment of a trustee under s. 21 (z).
- (iii) Special cases stated for the opinion of the High Court under s. 100 (a).
- (iv) Applications to transfer actions under s. 105 (4) (b)
- (v) Applications by the Board of Trade under s. 105 (5) (c).
- (vi) Applications by a trustee for leave to commence an action in the name of the trustee and of the bankrupt's partner under s. 117 (d).

(x) B.A. s. 102 (5). So far as the authors are aware no order has been made under this subsection.

(y) See *post*, p. 35.

(a) See *ante*, p. 34.

(c) See *post*, p. 130.

(z) See *post*, p. 115.

(b) See *post*, p. 40.

(d) See *post*, p. 342.

- (vii) Applications for the approval or for the amendment of issues of fact to be tried by a jury under r. 92.
- (viii) Applications for directions as to the trial of issues of fact under r. 94; and
- (ix) Applications for directions as to the trial of actions brought by a trustee under r. 123.

As the above directions in terms only apply to High Court registrars, County Court judges can give their own directions as to what business within the limits of s. 102 the registrars shall take in their Courts.

Adjournment to Judge.—Any matter, which a registrar has jurisdiction to determine, shall be adjourned to be heard before the judge, if the judge, either specially or by any general direction applicable to the particular case, shall so direct (*e*)

Extent of Jurisdiction.—By s. 100 (1), subject to the provisions of the Act, every Court having original jurisdiction in bankruptcy shall have jurisdiction throughout England and Wales.

County Courts.—The powers and jurisdiction of the County Courts are in the ordinary way less extensive than the High Court, but a County Court, for the purposes of its bankruptcy jurisdiction, has, in addition to the ordinary powers of the Court, all the powers and jurisdiction of the High Court, and the orders of the Court may be enforced accordingly (*f*). Amongst other ways such orders may, like High Court orders, be enforced by action (*g*). But in some respects, that are set out below, the County Court's jurisdiction in bankruptcy is less than that of the High Court.

The general jurisdiction of the bankruptcy Courts is defined in s. 105 and in decisions on similarly worded sections of previous Acts.

By the Act, every Court having jurisdiction in bankruptcy under the Act shall have power to decide all questions of priorities, and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognisance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of

(*e*) B.R. 8.

(*f*) B.A. s. 103.

(*g*) *Savill v. Dalton*, [1915] 3 K.B. 174.

doing complete justice or making a complete distribution of the property in any such case:

Provided that the jurisdiction hereby given shall not be exercised by the County Court for the purpose of adjudicating upon any claim, not arising out of the bankruptcy, which might heretofore have been enforced by action in the High Court, unless all parties to the proceeding consent thereto, or the money, money's worth, or right in dispute does not in the opinion of the judge exceed in value £200. (*h*)

The nature of "a claim arising out of the bankruptcy" must be understood in considering the limitation imposed on the County Courts jurisdiction in the proviso to this sub-section. Disputes between debtor and trustee and creditors as a rule clearly arise out of the bankruptcy. Where a third party or stranger is involved it is not always so clear. If the trustee in bankruptcy claims by a higher title than the bankrupt it has been held that the claim "arises out of the bankruptcy," but this is not so in the case of a trustee enforcing a mere money demand and claiming no larger right than the bankrupt (*i*). In *Re Hawke* (*k*), CAVE, J., said that the "claim would not have arisen but for the bankruptcy, and therefore it is a claim arising out of the bankruptcy." The same rule applies in the summary administration of small bankruptcies (*m*). Although by the use of the word "shall" in the Act it would seem that the exercise of its unlimited jurisdiction is compulsory on the County Court in claims arising out of the bankruptcy, it has been held (*n*) that the judge has in each case a judicial discretion whether or not he will exercise his jurisdiction, and in *Re Beswick* (*o*) it was said that "whenever the amount is large or a question of character arises it is the duty of the County Court judge to hold his hand and allow the case to go before the proper tribunal unless some special circumstances are shown why he should not."

It will be seen, therefore, that the County Court judge has without the consent of the parties complete jurisdiction to decide all questions arising out of the bankruptcy whatever the amount involved, and also in the other matters mentioned where, in his opinion, not more than £200 is involved. This

(*h*) B.A. s. 105 (1).

(*i*) *Ex p. Musgrave* (1878), 10 Ch D. 94; *Ex p. Brown* (1878), 11 Ch.D. 148.

(*k*) (1885), 16 Q.B.D. 503.

(*m*) *Re Billing* (1902), 86 L.T. 689. See also *post*, p. 321.

(*n*) *Re Arnold* (1891), 9 Mor. 1.

amount is decided on the application as presented, and not as ascertained after investigation (*p*). If the sum exceeds £200, and does not "arise out of bankruptcy," and the claim could be enforced by action in the High Court, the County Court has no jurisdiction unless all the parties consent.

Transfer or Stay of Proceedings.—Where a receiving order has been made in the High Court, the judge by whom such order is made has power in his discretion and without any further consent to order the transfer to himself of any action pending in any other division and brought or continued by or against the debtor (*q*). However, this discretionary jurisdiction will not be exercised "unless the trustee, by the operation of the law of bankruptcy, has a higher and better title than the bankrupt himself" (*r*).

Also any bankruptcy Court may, at any time after the presentation of a bankruptcy petition, stay any action, execution, or other legal process against the property or person of the debtor, and the Court in which such proceedings are pending may, on the proof of presentation of a bankruptcy petition, either stay them or allow them to continue on such terms as it may think just (*s*).

This section seems in terms to give the County Court sitting in bankruptcy power to stay a High Court action, but this has been doubted (*t*). Although there is this power to stay proceedings, yet since the Judicature Act, 1873, one branch of the High Court cannot restrain a plaintiff from proceedings with an action in another branch, the County Court sitting in bankruptcy is in no better position and cannot restrain High Court proceedings (*u*). However, a Court having jurisdiction in bankruptcy is not subject to be restrained in the execution of its powers under the Bankruptcy Act by the order of any other Court (*s*. 105 (1)); neither *certiorari* (*v*) nor prohibition (*w*) are available against the order of a County Court judge sitting in bankruptcy, nor do appeals lie from his decisions except in the manner directed by the Bankruptcy Act (*x*) (*y*).

(*p*) *Re Healey* (1905), 93 L.T. 704. (*q*) B.A. s. 105 (4).

(*r*) *Per* VAUGHAN WILLIAMS, J., in *Re Champagné* (1893), 10 Mor. 285.

(*s*) B.A. s. 9 (1).

(*t*) *Re Richardson* (1902), 86 L.T. 690.

(*u*) *Ex p. Reynolds* (1885), 15 Q.B.D. 169.

(*v*) *Skinner v. Northallerton County Court Judge*, [1899] A.C. 439.

(*w*) *Re New Par Consols, Ltd.*, [1898] 1 Q.B. 669.

(*x*) B.A. s. 105 (2).

(*y*) See *post*, p. 318.

CHAPTER 3

PROCEEDINGS TO RECEIVING ORDER, INCLUDING PERSONS WHO CAN BE MADE BANKRUPT AND ACTS OF BANKRUPTCY

WHEN bankruptcy proceedings are contemplated two questions must be considered. As on bankruptcy very drastic consequences for the debtor ensue, not only must the debtor be:

(1) a person who can be made bankrupt;

but also he must have done some act from which the law presumes that he is either unable, or is attempting to make himself unable, to pay all his just creditors in full. This is presumed from:

(2) an act of bankruptcy committed by him.

A receiving order in certain circumstances apart from the commission of an act of bankruptcy can also be made on a judgment summons. This peculiar case is considered later (a).

1. WHO CAN BE MADE BANKRUPT

The position is not governed by a single principle, and depends largely upon the method by which the person is to become bankrupt. In the earlier statutes no definition of "debtor" was given; the Courts, however, placed a limitation on the construction of that word. In so doing JAMES, L.J., said, in *Ex p. Blain* (b): "It appears to me that the whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects or to foreigners who by coming into this country, whether for a long or short time, have made

(a) See *post*, p. 326.

(b) (1879), 12 Ch. D. 522, at p. 526.

"themselves during that time subject to English jurisdiction. "Every foreigner who comes into this country for however "limited a time is, during his residence here within the alleg- "iance of the Sovereign, entitled to the protection of the "Sovereign and subject to all the laws of the Sovereign."

Who is a Debtor.—A receiving order under s. 107 (4) (a) can be made during mere residence in lieu of a committal order on judgment summons under the Debtors Act (c). But this is the only case in which this principle can be applied without qualification, as now by the Bankruptcy Act, s. 1 (2):—

The expression "a debtor," unless the context otherwise implies, includes any person, whether a British subject or not, who at the time when any act of bankruptcy was done or suffered by him:

- (1) was personally present in England; or
- (2) ordinarily resided or had a place of residence in England; or
- (3) was carrying on business in England, personally, or by means of an agent or manager; or
- (4) was a member of a firm or partnership which carried on business in England.

A person and only a person coming within any of these four headings, is a debtor capable of committing an act of bankruptcy in the eyes of the English law (d). Such a debtor could file his own petition, and could probably be served with a bankruptcy notice (e).

Against what Debtors may a creditor petition.—Although the person committing the act of bankruptcy may be within this section, a creditor is not entitled to present a bankruptcy petition against a debtor unless (*inter alia*):

- (i) The debtor is domiciled in England; or
- (ii) within a year before the date of presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England, or (except in the case of a person domiciled in Scotland or Northern Ireland

(c) *Re Clark*, [1898] 1 Q.B. 20.

(d) *Re Pearson*, [1892] 2 Q.B. 263.

(e) See *post*, p. 63.

or a partnership having its principal place of business in Scotland or Ireland) has carried on business in England, personally, or by means of an agent or manager; or

- (iii) (except as aforesaid) is or within the said period has been a member of a firm or partnership of persons which has carried on business in England by means of a partner or partners or an agent or manager (f).

Act of Bankruptcy by Agents.—Both these sections clearly imply that acts of bankruptcy can be committed by an agent. But under the old law BRETT, L.J., in *Ex p. Blain* (g) said: "An act of bankruptcy must be the personal act or personal default of the person who is to be made bankrupt. . . . A man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorised and of which he has had no cognisance" and nor "can a firm as such." But, although this in general appears to be law still, it is qualified considerably, for "some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal" (*per* Lord HALSBURY in *Blackburn, Low & Co. v. Vigors* (h)).

This is well illustrated in the case of *Re Drabble Bros.* (i). It was within the scope of an agent's authority to decide who should be paid, and when and why and how much they should be paid. With knowledge of his principal's insolvency and with intent to prefer certain creditors the agent made out cheques in their favour for sums not yet due which the principal signed in the ordinary course of business, and without any intent to prefer them. On those facts this principle was applied, and the fraudulent preference on the agent's part was held to be an act of bankruptcy by the principal.

In any case, where paras. (c) or (d) of sub-s. (2) of s. 1 is relied on to give jurisdiction and the acts are not the personal acts of the proposed bankrupt the limitations set forth in these cases must also be satisfied.

(f) B.A. s. 4 (1) (d).

(g) (1879), 12 Ch. D. 522, at p. 529.

(h) (1887), 12 App. Cas. 531, at p. 537.

(i) [1930] 2 Ch. 211.

What is Residence or a Dwelling-house.—What will constitute residence and dwelling-house, expressions used in both s. 4 and s. 1 (2), is a question of fact in each case. Thus:

Where a Frenchman having a French domicile for the purpose of prosecuting an action in London took for three months a furnished flat in Piccadilly that was not self-contained, but gave exclusive use of his own room, and during that time he paid frequent visits to his children in Paris, he was held to have had a dwelling-house in England (*k*).

Where a foreigner who had owned the lease of and resided in a house, but had gone abroad more than a year before the presentation of the petition, and from that time resided in Paris, but retained ownership of the lease to a date within the year and could therefore have returned to the house if he chose within the year, *ESHER, M.R.*, in holding that he had not a "dwelling-house in England" within a year, etc., said: "If a man has a house belonging to him, but he had abandoned it as a dwelling-house, that house is not his dwelling-house within the meaning of this section" (*l*).

Where a foreign debtor had a room at an hotel for eighteen months, he was held to have ordinarily resided in England (*m*).

Where, however, a Scot domiciled in Scotland spent twenty weeks of the year in England, ten weeks of which he spent on visits in the country and the rest in London, only occupying a bedroom which he took by the night, he was held not to have "ordinarily resided," or even "resided" in England (*n*).

To summarise, if the person is temporarily within the jurisdiction a receiving order may during that time be made against him under the principle of *Ex p. Blain* in lieu of a committal order under s. 107 (4); if he is a debtor within s. 1 (2) he may file his own petition, that in itself being deemed to be an act of bankruptcy (*o*), but if a creditor presents a petition he must show that the proposed bankrupt was within s. 1 (2) at the time an act of bankruptcy was committed and, also, at the time of presenting the petition he is within s. 4 (*a*).

Foreigners.—It will have been noted that nationality has nothing whatever to do with the question of whether or no

(*k*) *Re Hecquard* (1889), 24 Q.B.D. 71.

(*m*) *Re Norris* (1888), 5 MoI 111.

(*o*) B.A. s. 6 (1).

(*l*) *Re Nordenfelt*, [1895] 1 Q.B. 151.

(*n*) *Re Erskine* (1893), 10 T.L.R. 32.

a person is capable of being made bankrupt. If the above conditions apply and he does not fall within any of the exceptions mentioned below he may be made bankrupt whatever his nationality.

Ambassadors.—The usual immunity granted to diplomatic agents, their suites and households covers bankruptcy process. The privilege is absolute as far as the minister himself is concerned (*p*), but it is lost by a member of his establishment if such a person engages in trade (*q*). Also the service rendered to the minister must be *bonâ fide* and not merely colourable for the purpose of obtaining immunity (*r*).

Corporations.—By s. 126 any corporation or any partnership or association or company registered under the Companies Acts cannot be made bankrupt, but they can be wound up under the provisions of those Acts. The bankruptcy laws, however, apply with certain modifications (*s*) to limited partnerships formed under the Limited Partnerships Act, 1907.

Infants.—Although there are cases reported in which infants have been adjudicated bankrupt, and the Court has refused to supersede the bankruptcy on the ground of infancy (*t*), these cases cannot be taken as settling the question, because the Court merely refused summary relief and left the matter open for the bankrupt to contest the matter in an action at law, since at that time adjudication was not final. As these peculiar cases must be set aside, it seems doubtful if an infant can ever be made bankrupt (*u*). "If he is not a debtor he is not a person who . . . can be made bankrupt" (*a*). Representing himself to be of age does not make him a debtor (*b*). He can, therefore, only be made bankrupt if, indeed, he can be made bankrupt at all, in those cases in which he is liable for a debt. He is liable for a tort *ex delicto*, but not *ex contractu* (*c*), and a judgment in tort constitutes a debt. He is also liable in equity for fraud. Even a decree on such a liability did not, however,

(*p*) *Magdalena Steam Navigation Co. v. Martin* (1859), 2 E. & E. 94.

(*q*) Diplomatic Privileges Act, 1708, s. 5.

(*r*) *Re Cloete* (1891), 8 Morr. 195. (*s*) See *post*, p. 353.

(*t*) *e.g. Ex p. Watson* (1809), 16 Ves. 265.

(*u*) *Ex p. Jones* (1881), 18 Ch. D. 109.

(*a*) *Per* JESSEL, M.R., in *Ex p. Jones*, *supra*, at p. 119.

(*b*) *Ex p. Jones*, *supra*. (*c*) See Addison on Torts, 8th Edn., pp. 147, 148.

constitute a debt prior to the Judicature Act, 1873, and whether it is now a debt has yet to be decided. He is liable in respect of contracts for necessities, but not on a bill of exchange or promissory note given for the price of necessities, and cannot be made bankrupt in respect of such a bill (*d*). In *Re Soltykoff* (*d*) *ESHER*, M.R., expressly leaves open the question whether an infant can be made bankrupt even for the price of necessities, and *BAGALLAY*, L.J., does the same in *Ex p. Jones* (*supra*), as regards a liability in equity for fraud.

An infant partner of an adult cannot be made bankrupt for a partnership debt (*e*); nor could two infants who were the sole partners in a business for trade debts which, of course, are not necessities (*f*).

Lunatics.—Whether in any circumstances a lunatic can be made bankrupt has been, and still is, in doubt; opposite opinions having been expressed by *WILLES*, C.J. (*g*), and by Lord *ELDON* (*h*); and later, in *Re Farnham* (*i*), which was decided on another point, *RIGBY*, L.J., at p. 810, said: "I am not myself satisfied that there can be an adjudication in bankruptcy against a lunatic otherwise than through the judge in lunacy, directing the committee in the name of the lunatic to commit an act of bankruptcy."

Section 149 provides for this exception by allowing a lunatic to act by his committee or *curator bonis* for all or any of the purposes of the Act. The Court in Lunacy has given leave for a lunatics' committee to consent to an adjudication (*k*); and to file a declaration of inability to pay debts in the lunatic's name (*l*). It has, however, been decided that an act of bankruptcy involving intent cannot be committed by a lunatic (*m*). This decision would probably not apply to acts done during a lucid interval.

Married Women.—Formerly every married woman who carried on a trade or business, whether separately from her

(*d*) *Re Soltykoff*, [1891] 1 Q.B. 413.

(*e*) *Lovell & Christmas v. Beauchamp*, [1894] A.C. 607.

(*f*) *Re A. and M.*, [1926] Ch. 274.

(*g*) *Crispe v. Perritt* (1744), *Willes*, 467, at p. 473.

(*h*) *Anon.* (1807), 13 Ves. 590.

(*i*) [1895] 2 Ch. 799.

(*k*) *Re Lee* (1883), 23 Ch. D. 216.

(*l*) *Re James* (1884), 12 Q.F.D. 332.

(*m*) *Ex p. Stamp* (1846), De Gex, 345.

husband or not, was subject to the bankruptcy laws as if she were a *feme sole* (n). Whether she was carrying on either a trade or business was a question of fact in each case. But since the 2nd of August, 1935, the date of the passing of the Law Reform (Married Women and Tortfeasors) Act, 1935, by s. 1 (d) of that Act, a married woman may be made bankrupt as if she were a *feme sole*, but no judgment on a contract entered into or debt or obligation incurred before the passing of that Act can be enforced under that Act (o), and further the Act repealed the above-mentioned s. 125 of the Bankruptcy Act, 1914. It has been held (p) that where the bank overdraft of a married woman, who was not a trader, had been guaranteed before this Act and the guarantor had paid the bank after the Act and the married woman had failed to reimburse him, this was an obligation incurred at the time of giving the guarantee and therefore was not a debt upon which a receiving order could be made. A receiving order made before the Act against a married woman trader was the subject of an appeal which was heard after the Act. It was held that by reason of s. 38 (2) of the Interpretation Act, 1889, which keeps alive existing proceedings in the event of the repeal of the Act upon which they are founded that the receiving order remained notwithstanding that the debt was incurred before the Act (q).

But whether a married woman trader can now be made bankrupt upon a debt incurred before the 2nd of August, 1935, does not appear to be the subject of a report decision, although registrars have refused to file petitions founded on such debts.

A married woman who is judicially separated from her husband, or who has obtained a protection order which is still continuing, may sue or be sued as a *feme sole* (Judicature Act, 1925, ss. 194, 226, Matrimonial Causes Act, 1857, s. 21), and, therefore, it seems can be made bankrupt apart from any question under the Law Reform Act.

2. ACTS OF BANKRUPTCY

At the outset it should be emphasised that any act of bankruptcy must fall within the actual words of the Act, because in

(n) B.A. s. 125 (1).

(o) Law Reform (Married Women and Tortfeasors) Act, 1935, s. 4 (1).

(p) *Re A Debtor* (No. 627 of 1936), [1937] Ch. 156; [1937] 1 All E.R. 1.

(q) *Re A Debtor* (No. 490 of 1935), [1936] Ch. 237.

the words of BOWEN, L.J., in *Ex p. Chinery* (r): "The words ". . . when . . . found in a section of an Act of Parliament "which is defining acts of bankruptcy, . . . should be construed as strictly as if they occurred in a section which was "defining a misdemeanour, because the commission of an act "of bankruptcy entails disabilities on the person who commits "it." Therefore it is necessary to consider carefully the actual words of the statute in each case.

A debtor commits an act of bankruptcy if he does any of the following acts:

1. **If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally** (Bankruptcy Act, s. 1 (1) (a)).

It should be noted that, according to Lord ESHER in *Re Spackman* (s), this "apart from any question of intent, is *per se* considered to be an act of bankruptcy" (s), and although this clause of the subsection speaks only of "his property," "an assignment [or conveyance] of part of the debtor's property "will not be within it [*i.e.* this clause]. There must be an "assignment [or conveyance] of the whole, or substantially "the whole, of his property" (*ibid.*).

The reason for this is given by FRY, L.J., in the same case (at p. 741), when he points out that "there is a contrast between "sub-s. (1) (a) and sub-s. (1) (b). Sub-s. (1) (a) deals with a "conveyance or assignment of the debtor's property. Sub-s. "(1) (b) deals with a fraudulent conveyance, gift, delivery, or "transfer of his property or any part thereof. If the intention "had been that an assignment of any part of the debtor's "property should be within sub-s. (1) (a), I think the legislature "would have said so expressly."

Conveyance or Assignment.—What constitutes "a conveyance or assignment" for the purposes of this paragraph was laid down in *Re Spackman* (*supra*) and *Re Hughes* (t), and these cases were approved in *Lipton, Ltd. v. Bell* (u). These cases have already been dealt with in the chapter on "Deeds of Arrangement" (a).

(r) (1884), 12 Q.B.D., at p. 346.

(t) [1893] 1 Q.B. 595.

(a) See *ante*, p. 15.

(s) (1890), 24 Q.B.D. 728, at p. 738.

(u) [1924] 1 K.B. 701.

To be within this clause, the conveyance or assignment must be for the benefit of all the creditors, not a class only, *e.g.* trade creditors (*b*). But such an act may be an act of bankruptcy under paras. (*b*) and (*c*) of s. 1 (1) of the Act (*c*). Deeds that are incomplete from lack of stamping or registration and are therefore void under the Deeds of Arrangement Act, 1914 (*d*), are still available as acts of bankruptcy.

Place of Execution and Situation of the Property.—The words “or elsewhere” give rise to a question of some difficulty. Prior to the Bankruptcy Act, 1913, where the present extended definition of “debtor” was first introduced, a “debtor” was an English subject or a foreigner during his residence in England, for however limited a time (*c*). In that state of affairs the law was laid down by the House of Lords in *Cooke v. Chas. A. Vogeler Co.* (*f*).

In that case, two U.S. subjects, who had never been in England, but who traded by means of a manager and had assets in England, executed in Maryland an assignment, intended to operate according to the law of Maryland, of all their property to a trustee for the benefit of their creditors generally. The point taken was whether the section which was first introduced in the Bankruptcy Act, 1883, and corresponded to s. 4 (1) (*d*) of Bankruptcy Act, 1914 (*g*), naming the conditions under which a petition could be presented, had extended the jurisdiction of the English Bankruptcy Courts:

Held, that the person must be a “debtor” before the conditions under which a petition can be presented apply, and therefore the jurisdiction was not extended, and consequently it was not an act of bankruptcy and also that the assignment was not an act of bankruptcy.

But in his speech in that case HALSBURY, L.C., quoting with approval from *Ex p. Crispin* (*h*), said: “This [act of bankruptcy] seems clearly intended to relate to a conveyance which ‘is to operate according to English law, which a conveyance ‘executed by a domiciled Englishman, although out of England,

(*b*) *Re Phillips, Ex p. Barton*, [1900] 2 Q.B. 329.

(*c*) See *post*, p. 50, 57. For when a deed is construed as being for the benefit of creditors generally, see p. 17, *ante*.

(*d*) See *ante*, p. 21.

(*f*) [1901] A.C. 102.

(*h*) (1873), L.R. 8 Ch. 374.

(*e*) See *ante*, p. 42.

(*g*) See *ante*, p. 42.

"may do, but a conveyance executed by a domiciled foreigner "in his own country must necessarily operate according to "the foreign law, and we think it was never intended that such "a conveyance should be an act of bankruptcy."

The above passage is in the nature of a limitation to be put upon the construction of the words "conveyance or assignment." It has now been decided (i), as was forecast in the first edition of this book, that the extension by the B.A. 1914, mentioned above, of the definition of a debtor will not enlarge the meaning of "conveyance or assignment" so as to include such document intended to operate by foreign law. All that can be said, then, is that the conveyance or assignment by a debtor, as defined in s. 1 (2), if intended to operate according to English law is an act of bankruptcy wherever executed, but if such a document executed by such a debtor who is a domiciled foreigner, is intended to operate by foreign law it is not.

When a creditor is debarred from relying on the execution of such a conveyance or assignment by reason of having either executed the deed, acquiesced therein or been served with the statutory notice, has been dealt with previously (k).

2. If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof (Bankruptcy Act, s. 1 (1) (b)).

It is usual to divide fraudulent assignment within this paragraph into two classes:

1. Assignments fraudulent at Common Law or under s. 172 of Law of Property Act, 1925, which replaces 13 Eliz., c. 5.
2. Assignments fraudulent under the Bankruptcy Statutes'

Considered purely as an act of bankruptcy upon which to form a petition, it is immaterial within which class the assignment falls, and provided that the assignment is made within three months of the date of the petition on which the debtor is made bankrupt, all the consequences are the same. The assignment will then, in either case, be an available act of

(i) *In Re Debtors* (No. 836 of 1935), [1936] Ch. 622; [1936] 1 All E.R. 875
 (k) See *ante*, p. 24.

bankruptcy, irrespective of whether or no the property has passed to a *bonâ fide* purchaser. But if it is solely a question of settling the assignment aside for the benefit of the creditors, then, if assignment is within the latter class the property comprised in the assignment can only be made available to the creditors by means of the bankruptcy laws, *e.g.* if it falls within the doctrine of relation back or is avoided as a voluntary settlement by s. 42 (1); but if it falls within the former it is voidable except as against *bonâ fide* purchasers without reference to such special periods of time at the instance of any person thereby prejudiced, which includes the trustee in bankruptcy. It is, therefore, well to make the distinction from the beginning.

1. Assignments Fraudulent at Common Law or under s. 172 of the Law of Property Act, 1925.—13 Eliz., c. 5, which the Law of Property Act, 1925, s. 172, replaces, may be said to be declaratory of the Common Law on frauds on creditors (*m*). Section 172 is as follows:

(1) Save as provided in this section, every conveyance of property made, whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.

(3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the conveyance, notice of intent to defraud creditors.

The Consideration.—The section applies to conveyances both voluntary and for valuable consideration, except that naturally voluntary conveyances are more open to suspicion, and therefore in such cases fraud is more easily inferred and that by the third sub-s. a transferee taking in good faith for valuable or good consideration is protected, there is no distinction. The valuable consideration mentioned here is defined as including marriage, but not a nominal consideration in money (*n*). Good consideration is a new addition made in 1925 and has yet to receive judicial interpretation.

(1) See *post*, Chap. 8, p. 210.

(*m*) *Cadogan v. Kennett* (1776), 2 Cowp, p. 434.

(*n*) Law of Property Act, 1925, s. 205 (1) (xxi).

The Property.—Under 13 Eliz., c. 5 it was held that since creditors cannot be delayed, hindered, or defrauded by the alienation of property that was never within their reach, that statute only applied to property that could be taken in execution (*o*). Therefore the property must situate in England or Wales. The inclusion of new kinds of property within the reach of execution extends the scope of the statute (*p*). This reasoning is also applicable to s. 172 of the Law of Property Act, 1925, and therefore it is submitted that in this respect the law is unaltered.

The Conveyance.—The statute of Elizabeth applied to all forms of alienation of property (*q*). The present statute speaks only of conveyance and defines conveyance (*r*) as including mortgage, charge lease, assent, vesting declaration, vesting instrument, disclaimer, release, and every other assurance of property or of an interest therein by any instrument, except a will. The operation of the present statute is, therefore, it seems, less extensive than 13 Eliz., c. 5, and does not cover transfers of property that do not require some instrument to effect them, *e.g.* delivery of chattels.

The point, however, is only of importance when seeking to set aside such a transfer made before the period of relation back. As the B.A. s. 1 (*1*) (*b*), set out above, speaks of a fraudulent conveyance, gift or transfer, such transfers are still acts of bankruptcy.

The Fraudulent Intent.—In the first place, in ascertaining if the debtor has committed an act of bankruptcy it is only relevant to consider whether the debtor in making the assignment intended to defraud his creditors, but in avoiding the assignment the question of the good faith of the transferee and notice to him of the maker's fraud at once arises, and if he has taken in good faith without notice he is protected by the third subsection. It may be noted here that if before the transaction is avoided a transferee, who is not protected by reason of his privity to the fraud, assigns to a *bonâ fide* purchaser for value without notice such assignment is valid (*s*).

(*o*) *Mathew v. Traver* (1786), 1 Cox Eq. 278.

(*p*) *Ideal Bedding Co. v. Holland*, [1907] 2 Ch. 157, 166.

(*q*) *Cadogan v. Kennett* (1776), 2 Cowp, 432.

(*r*) Law of Property Act, 1925, s. 205 (1) (ii).

(*s*) *Morewood v. South Yorkshire Rail. Co.* (1858), 3 H. & N. 789.

Merely because the assignment has the effect of defeating creditors is no ground for holding that it is fraudulent under this Act (t).

It is not within the scope of this small book to discuss all the circumstances in which the Court has inferred fraud. It is sufficient to say that the true test appears to be whether or no from all the circumstances of the particular case the Court can infer that the assignment was made with intent to defeat, delay, or defraud existing or subsequent creditors. This is a question of fact to be decided in each case (u).

2. Assignments Fraudulent under the Bankruptcy Laws.—Assignments which, although by reason of the maker's intent are fraudulent within sub-s. (1) of s. 172 of the Law of Property Act, 1925, but could not be declared void under that section, because the transferee was not privy to the fraud and therefore protected by the third subsection, are acts of bankruptcy under this heading. Regarded purely as acts of bankruptcy only the maker's fraudulent intent is relevant and the transferee's privity or lack of privity is immaterial. As a transfer cannot be set aside under s. 172 if either there is no fraud on the maker's part, or the transferee was not privy to it and in many reported cases the judges do not clearly distinguish which aspect they are dealing with, the difference must be clearly borne in mind. But sufficient has been said about these cases above. Therefore it is intended to deal under this heading only with those cases which are not fraudulent under sub-s. (1) of s. 172 of Law of Property Act, 1925.

From the short discussion of the cases which follows, it will be seen that any assignment whose natural consequence at the time of its making is to defeat creditors of the payment of their debts or delay it or defraud them of their rights to distribution of his property according to the bankruptcy laws whether such an intent was in fact present or absent, is an act of bankruptcy.

An assignment for the benefit of creditors generally (a), and one that amounts to a fraudulent preference (b), are made separate acts of bankruptcy, but an assignment of the whole of the debtor's property for the benefit of one or some only, or

(t) *Re Lane Fox*, [1900] 2. Q B. 508.

(u) *Glegg v. Bromley*, [1912] 3 K.B., at p. 492.

(a) See *ante*, p. 48.

(b) See *post*, p. 57.

only certain classes of creditors, would be fraudulent under this heading, and as such is an act of bankruptcy (c).

The Fraudulent Intent.—The word fraudulent in this act of bankruptcy means fraudulent against creditors (d). Under the first heading such intent must in fact be present, but under this heading it may be a conclusion of law.

For instance, an application for membership of the Stock Exchange followed by a written declaration of default by a member transfers all the member's assets to the official assignees of the Stock Exchange for the benefit of his Stock Exchange creditors. As this is in effect a deed of arrangement for the benefit of only a class of creditors and withdraws the property from the reach of the general creditors, it was held in *Tomkins v. Saffery* (e) fraudulent under this heading, although there was no fraudulent intent or fraud in its ordinary sense.

Again, an embarrassed trader secretly assigned substantially the whole of his property in consideration of the release of a past debt due to the assignee and a verbal promise by him to pay the assignor's debts. In holding that it was an act of bankruptcy under this head, COTTON, L.J., in *Ex p. Chaplin* (f), said:

"If persons will take from a man who is in difficulties a deed of this description, which has the effect of withdrawing and is intended to withdraw all the property of the debtor from the legal process which his creditors have a right to enforce against him and bankruptcy ensues, the deed is void under the bankruptcy law. It is fraudulent as well as void whatever may have been the view of those who were engaged in the transaction, that it might be the best thing for the debtor, or that it might afford an effectual way of paying the creditors."

However honestly an assignment may have been made if, in fact, the transaction naturally tends to defeat or delay creditors, it is fraudulent under this heading (g).

(c) *Ex p. Holder* (1834), 24 Ch. D. 339.

(d) *Re Wood* (1872), 7 Ch. App. 302.

(e) (1877), 3 App. Cas. 213.

(f) (1884), 26 Ch. D. 319, at p. 331.

(g) *Re David and Adlard*, [1914] 2 K.B. 694.

It would seem at first sight that all assignments of substantially the whole of the debtor's property would tend to have this effect, but where the debtor gets for the assignment an equivalent, although that equivalent need not be an actual equivalent in point of value, and that equivalent is equally available for satisfying the creditors, the assignment is not then held to tend to defeat or delay creditors (*h*).

This applies *simpliciter* to a sale for a present consideration or mortgage for a present advance, and cannot apply where the only consideration for the assignment was a past debt. But where the consideration is not only a past debt but also a present advance or a past debt and an agreement to make future advances, these elements may save the transaction from being an act of bankruptcy. The mere fact of such real present advance, or *bonâ fide* agreement to make advances, does not necessarily save the transaction. The amount of the advance is not the test, "as in times of pressure an advance of ready money of a very small amount may very often prevent a trader from stopping payment and enable him to pay all his creditors 20s. in the £" (*i*).

"The greatness or smallness of the advance made by the lender to the grantor though to be taken into consideration, is not the real test. The real test is (whatever the amount of the advance as compared with the antecedent debt was), Did the lender intend that the advance should enable the debtor to carry on his business, and had he a reasonable ground for believing that it would enable him to do so?" (*k*). But "where a debtor assigns the whole of his property as security for a past debt only it is an act of bankruptcy whatever the motives of the parties may have been" (*l*).

The above reasoning can only apply where the assignment covers substantially the whole of the debtor's property or where the exception is only colourable (*m*); or where the nature of the excepted property, however large in amount, is such that

(*h*) *Woodhouse v. Murray* (1868), L.R. 2 Q.B. 634, and *Re David and Adair*, *supra*.

(*i*) *Per* COCKBURN, C.J., in *Woodhouse v. Murray*, *supra*, at p. 639.

(*k*) *Per* COLLIN, L.J., in *Ex p. Johnson* (1884), 26 Ch. D., at p. 346.

(*l*) *Per* MELLISH, L.J., in *Ex p. Ellis* (1876), 2 Ch. D. 797.

(*m*) *Pennell v. Reynolds* (1861), 11 C.B.N.S. 709, *Smeth v. Timms* (1863), 32 L.J. Ex. 215.

it cannot be taken in execution and would not pass to the trustee (n).

The test whether the exception is only colourable or is of such amount that it will save the assignment from being an act of bankruptcy appears to be, is the assignment such that if acted upon, in spite of the excepted property, it will produce insolvency or stop the debtor carrying on his trade? (o). But it must stop his trade by producing insolvency not merely because the assignment includes his stock-in-trade or business effects (p). If the exception is so large that these consequences would not naturally ensure an assignment of part of a debtor's property is not an act of bankruptcy.

An assignment of part of the debtor's property made with the object of defrauding creditors of the rights under bankruptcy laws, *e.g.* to induce them not to press for their debts or to avoid publicity of the debtor's embarrassed condition, by evading the requirements of the Bills of Sale Acts, will be an act of bankruptcy (q); but it is difficult to see how an assignment can have this object or consequence unless either

- (i) the assignment is of so large a portion of the debtor's property that the excepted property is not sufficient to prevent insolvency resulting, in which case it could be considered as an assignment of the whole with only a colourable exception, or
- (ii) the excepted property is of such an unrealisable value that the creditors must be delayed, in which case fraudulent intent under s. 172 (1) of the Law of Property Act, 1925, could be inferred.

The Property.—For the same reason as under the first heading the property transferred must be such that it can be taken in execution.

Conveyance, Gift, Delivery or Transfer.—These words are sufficiently wide to cover any form of alienation. Therefore

(n) *Ex p. Hawker* (1872), L.R. 7 Ch. 214.

(o) *Leake v. Young* (1856), 5 E. & B. 955; *Smith v. Cannan* (1853), 2 E. & B. 35.

(p) *Young v. Waud* (1852), 8 Ex. 221.

(q) *Ex p. Pearson* (1873), L.R. 8 Ch. 667; *Ex p. Cohen* (1871), L.R. 7 Ch. 20; *Ex p. Stevens* (1875), L.R. 20 Eq. 786; *Re Hirth*, [1899] 1 Q.B. 612.

transfers, formerly within 13 Eliz., c. 5, but now owing to the definition of conveyance outside s. 172 of the Law of Property Act, 1925, now fall solely under this heading.

3. As to both Classes.—In England or Elsewhere.—Although the actual assignment can be executed elsewhere than in England, it does not, any more than in the previous acts of bankruptcy, extend the Court's jurisdiction (*r*). The assignment must be intended to operate by English law (*s*), and also the property transferred must be situated in England, as dealings in property, which is not available either for execution on an English judgment or for distribution according to English bankruptcy laws, cannot either defraud creditors or be a fraud on the bankruptcy laws in the eyes of English law.

When Void.—Assignments that are declared void merely as acts of bankruptcy and not void also under s. 172 of the Law of Property Act, 1925, cannot be set aside and treated as void unless they have been executed within the period to which the trustees' title relates, *i.e.* from the first act of bankruptcy within three months of presentation of the petition (*t*).

But where it is declared void merely as an act of bankruptcy and falls within the period of relation by reason of the doctrine of relation back (*u*), even *bonâ fide* second and subsequent transferees get no title (*a*) unless a good title is acquired by some peculiar rule of law, *e.g.* sale in market overt or transfer of a negotiable instrument.

The contrary is the case where the transfer is declared void under s. 172 of Law of Property Act, 1925, as *bona fide* purchasers are protected by sub-s. (3) (*b*).

3. If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt (Bankruptcy Act, s. 1 (1) (*c*)).

(*r*) See *ante*, p. 49.

(*s*) *Ex p Crispin* (1873), L.R. 8 Ch. 374.

(*t*) *Mercer v. Peterson* (1868), L.R. 3 Ex. 104.

(*u*) See *post*, chap. 6.

(*a*) *Re Gunshourg*, [1920] 2 K.B. 426.

(*b*) *Harrods, Ltd. v. Stanton*, [1923] 1 K.B. 516, *post*, p. 121.

The fraudulent preferences referred to in the above paragraph are defined in s. 44, which is as follows:

(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

By sub-s. (3), where a receiving order is made on a judgment summons, this section applies as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order.

"Originally there was no express statutory enactment in regard to fraudulent preference. But from the time of Lord Mansfield down to 1869 the Courts considered that certain transfers were frauds upon the bankruptcy law, though there was no statutory enactment upon the subject. Then came the Bankruptcy Act of 1869, and in that Act it was for the first time explained what was meant by fraudulent preference" (c).

The judge-made law, there referred to, required that the conveyance, etc., should be made in contemplation of bankruptcy and that it should be voluntary.

It will be noted that the two principal requirements now are that the conveyance, etc., should be

made by "a person unable to pay his debts as they become due," and

made "with a view of giving . . . a preference over other creditors."

It is not within the scope of this book to discuss how much the statutory definition has altered the law, if at all. "The law has now been put into a definite shape and form, and our duty is to construe the words of the Act" (d).

With a view to giving a Preference. The first requirement gives rise to no difficulty, but the second has been the subject of many decisions. BOWEN, L.J., in *Ex p Hill* (e), in discussing the possible interpretation of the words, said the correct interpretation was

"to read them as equivalent to 'with *the* view'—the real, effectual, substantial view—of giving a preference to the creditor, the word *a* being equivalent to *the*. . . . But if we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea. It is a very difficult matter to prove that the dominant motive was the sole motive, and I think the true test under s. 92 (now s. 44) is this: (1) had the debtor a view of giving a preference to the creditor? and (2) was that the operative effectual view?"

In ascertaining whether any case complies with the first part of the test it is necessary to consider what is meant by "a preference."

In *Sharp v. Jackson* (f) P, a solicitor had converted trust moneys to his own use, and on the eve of his bankruptcy and the consequent discovery of his criminal breaches of trust, conveyed property to a trustee upon trusts designed to make good the breaches he had committed:

Held, that the conveyance by P was not a fraudulent preference.

In his speech HALSBURY, L.C., said, quoting with approval from the judgments in the Court of Appeal:

"The question whether there has been a fraudulent preference depends, not upon the mere fact that there has been a preference, but also on the state of mind of the person who made it. . . . It appears to me obvious that he was not actuated by any feeling of bounty towards those in whose

(d) *Per* JESSEL, M.R., in *Ex p. Griffith*, *supra*.

(e) (1883), 23 Ch. D. at pp. 704 and 705.

(f) [1899] A.C. 419.

"favour the deed was made, but was doing what he did for
"his own benefit, . . . and it was to protect himself against the
"charges hanging over him."

And quoting from Lord CAIRNS in *Butcher v. Stead* (g), he said:

"The Act appears to me to have left the question of pressure
"as it stood under the old law (*i.e.* the judge-made law before
"the 1869 Act); and, indeed, the word 'preference,' implying
"an act of free will, would, of itself, make it necessary to consider
"whether pressure had or had not been used."

And he further stated that it was in the circumstances

"no longer a voluntary act, but an act under pressure—pressure
"not the less because it is pressure upon his own mind and his
"own consciousness—from an apprehension of what will happen
"if bankruptcy takes place; not a pressure by the threats of
"creditors to assert their rights."

Pressure.—It will be seen from the above that in deciding whether or not the payment etc., was "made with a view of giving a preference" it is material to consider whether it was made under pressure, for if the fact of payment being made was due to pressure, a preference is at once negated.

There are many reported cases showing the circumstances in which pressure will be inferred, ranging from *Ex p. Topham* (h), where a mere demand negated preference, to *Ex p. Hall* (i), where payment made after an action had been threatened but in circumstances which made the threat an empty one, was held a fraudulent preference.

It is not proposed to examine these cases, but only to point out that the Court has really in each case applied BOWEN, L.J.'s, test of ascertaining what was the dominant motive in the debtor's mind in making these payments.

Pressure, however, is only one of many dominant motives that may cause the payment, etc., to be made, and if it is not that of "giving a preference," the transaction cannot be impeached under this section. For example:

"Supposing a bankrupt, although knowing that he is very
"likely to stop payment next week, struggles on and makes
"a payment without being particularly asked; supposing he

(g) (1875), L.R. 7 H.L., at p. 846.

(h) (1873), L.R. 8 Ch. 614.

(i) (1882), 19 Ch. D. 580.

"pays his debts and sends his money 'o meet his bills on those days on which they became due, and does other things to keep himself alive and in good credit for the time; that would not have been an undue preference . . . because those payments were made in the hope—a desperate hope, perhaps—that if he were able to keep himself alive something might turn up in his favour" (k).

Preference by Agent.—"The view to prefer must be the view of the person making the payment" (l), but "some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be the acts, intentions, and knowledge of the principal (m). Where the employment of the agent is such that in respect of the particular matter in question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is, I think, correct" (n).

In the case of *In re Drabble Bros.* (l), it was within the scope of an agent's authority to decide who should be paid, and when and why, and how much the payment should be. With knowledge of his principal's insolvency that agent, in order to benefit himself, caused payments to be made to certain creditors with a view to prefer them, and although the principal thought the payments were made in the ordinary course of business and had no intent to prefer these creditors, this principle was applied and the fraudulent preference on the part of the agent was held to be an act of bankruptcy by the principal.

Person Preferred.—It should be noted that the person preferred must be a "creditor" or his surety or guarantor. To be a creditor within the meaning of this section it must be some one entitled to prove in the bankruptcy (o). It has, however, been held that a beneficiary and co-trustee are not creditors of a defaulting trustee (p).

But this was not the sole ground of the decision in these cases, and the doctrine was denied by Lord HALSBURY in *Sharp v.*

(k) *Per* Lord BLACKBURN in *Tomkins v. Saffery* (1877), 3 App. Cas. at p. 235.

(l) *Per* LAWRENCE, L.J., in *Re Drabble Bros.*, [1930] 2 Ch. 211, at p. 237.

(m) *Per* Lord HALSBURY in *Blackburn, Law, & Co. v. Vigors* (1887), 12 App. Cas. 531, at p. 537.

(n) *Ibid.* at p. 538.

(o) *Re Blackpool Motor Car Co., Ltd.*, [1901] 1 Ch. 77.

(p) e.g. *Ex p. Taylor* (1886), 18 Q.B.D. 295; *Re Lake*, [1901] 1 K.B. 710.

Jackson (q); although this denial was *obiter dictum* and not understood by RIGBY, L.J., in *Re Lake*, he avoided the point in his judgment, deciding the case on other grounds, and it seems likely that Lord HALSBURY'S view would be followed.

In Trust for any Creditor.—The meaning of the words "every payment, etc., made . . . in favour . . . of any person in trust for any creditor" have been the subject of decision in *Re Morant* (r). In that case P.O. LAWRENCE, J., in holding that money paid in the ordinary course of business to agents, received by them in good faith and by them paid over, could not be recovered, said that he did not think that the expression was "intended . . . to apply to the ordinary case of payment "to an agent for the use of his principal," but to "a payment "made . . . to a trustee (either created *ad hoc* or under an "existing instrument) in such circumstances as would support "the contention that no payment had been made to the creditor "himself"; and "it does not necessarily follow because a payment to the trustee for the creditor is to be deemed fraudulent "and void, the trustee to whom payment is made is personally "liable to pay the money to the trustee in bankruptcy." The Court "in determining upon his liability would take into "consideration (*inter alia*) whether he acted in good faith and "whether he still held the money or had paid it over to his "*cestui que trust* before having received notice that the payment "is fraudulent and void."

4. If with intent to defeat or delay his creditors, he does any of the following things, namely,

Departs out of England, or

being out of England remains out of England

or

departs from his dwelling-house, or

otherwise absents himself, or

begins to keep house (Bankruptcy Act, s. 1 (1) (d)).

In these acts of bankruptcy it is essential to prove that the act was done with intent to defeat or delay creditors, but having proved that the act was done and with that intent it is immaterial that it is impossible for any one to have been delayed thereby (s).

(q) [1899] A.C. 419.

(r) [1924] 1 Ch. 79.

(s) *Rouch v. G.W.R. Co.* (1841), 1 Q.B. 51.

Intent is necessarily a matter of inference from the facts of each case, and it should be noted that "if a domiciled English-man who is being pressed by his creditors and has been served with a writ were to leave England, and so to escape being served with a debtor's summons, there would be strong evidence that he intended to defeat or delay his creditors. . . . But we do not think the same reasoning applies to a foreigner who has come to England for a temporary purpose and leaves England to return to his own home" (t).

"An authorised denial to a creditor requiring to see his debtor is the most usual and familiar evidence of beginning to keep house," but "it is not the only evidence by which it may be proved . . . if he shut himself up in the house, debarring all access to it . . . secludes himself in his house to avoid the fair importunity of his creditors . . . he begins to keep house" (u). But "a mere direction given by a trader to deny him is not an act of bankruptcy, unless that direction be followed by an actual denial, or by concealing himself, or by some other act which is evidence of a beginning to keep house" (a).

If the creditor is denied at an unreasonable hour of the night or day the necessary intent to defeat or delay cannot be inferred from that denial (b).

5. If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days:

Provided that, where an interpleader summons has been taken out in regard to the goods seized, the time elapsing between the date at which such summons is taken out and the date at which the proceedings on such summons are finally disposed of, settled, or abandoned, shall not be taken into account in calculating such period of twenty-one days. (Bankruptcy Act, s. 1 (1) (e)).

(t) *Per* MELLISH, L.J., in *Ex p. Crispin* (1873), L.R. 8 Ch. 374.

(u) *Per* LORD ELLENBOROUGH in *Dudley v. Vaughan* (1808), 1 Camp. 217.

(a) *Per* BAYLEY, J., in *Fisher v. Boucher* (1830), 10 B. & C., at p. 712.

(b) *Smith v. Currie* (1813), 3 Camp. 349.

This act of bankruptcy is complete upon sale or where the sheriff has held the goods for twenty-one whole days exclusive of the day of seizure (c), and no fresh or continuing act of bankruptcy is committed by the sheriff remaining in possession for more than twenty-one days under the same seizure (d).

In *Ex p. Brooke* (e) it was held that under the old statute which only applied to an "execution . . . levied by seizure and sale of his goods" there was no act of bankruptcy where payment was made to the sheriff's officer to prevent seizure by him and assented to by the judgment creditor, and this seems applicable to the present wording of the section and also to payment in the like circumstances after seizure but before the goods had been held for twenty-one days, or, of course, sold.

6. If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself (Bankruptcy Act, s. 1 (1) (f)).

By r. 136 of Bankruptcy Rules the declaration must be dated, signed, and witnessed by a solicitor or a justice of the peace, or an Official Receiver or Registrar of the Court. The filing of the declaration is complete on "the delivery of it by "a properly authorised person to the proper officer at the proper "office with intent that it should be filed or placed upon "record" (f).

And with filing the act of bankruptcy takes place (f).

7. If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not within seven days after service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice

(c) In *Re North*, [1895] 2 Q.B. 264.

(d) In *Re Beeston*, [1899] 1 Q.B. 626.

(e) (1874), L.R. 9 Ch. 301.

(f) *Per* KEATING, J., in *Ransford v. Maule* (1873), L.R. 8 C.P. 672.

or satisfy the Court that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceeding in which the order was obtained.

For the purposes of this paragraph and of section two of this Act, any person who is, for the time being, entitled to enforce the final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order. (Bankruptcy Act, s. 1 (1) (g)).

A Bankruptcy notice under this Act shall be in the prescribed form, and shall require the debtor to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order, or to secure or compound for it to the satisfaction of the creditor or the Court, and shall state the consequences of non-compliance with the notice, and shall be served in the prescribed manner:

Provided that a bankruptcy notice

- (i) may specify an agent to act on behalf of the creditor in respect of any payment or other thing required by the notice to be made to, or done to the satisfaction of, the creditor;
- (ii) shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such misstatement; but, if the debtor does not give such notice, he shall be deemed to have complied with the bankruptcy notice if within the time allowed he takes such steps as would have constituted a compliance with the notice had the actual amount due been correctly specified therein (Bankruptcy Act, s. 2.).

Final Judgment.—The judgment must be final so far as the subject-matter of the bankruptcy notice is concerned, but it does not matter if the judgment contains further directions that have to be worked out afterwards, *e.g.* if an injunction is granted with costs and an inquiry as to damages is directed, the order for cost is final (*g*). If the judgment is under appeal the Court may stay or dismiss the petition (*h*).

It also must be a judgment or order obtained in an English Court as “the final judgment [or order mentioned in the sub-“section] obviously means a final judgment [or order] obtained “within the jurisdiction to which the Act is confined—that is “to say, England” (*i*).

A judgment registered under the Judgments Extension Act, 1868, had the same effect as an English judgment, but only so far as relates to execution; therefore, as the issue of a bankruptcy notice is not a form of execution, a bankruptcy notice cannot be issued on such a judgment (*i*).

Judgments registered under s. 9 of the Administration of Justice Act, 1920, appear to be in the same position.

Creditor.—A “creditor,” under this subsection, is not necessarily one who is, strictly speaking, a creditor for the sum for which the bankruptcy notice is issued before the final judgment or order is obtained; it is sufficient if he becomes a creditor under the judgment (*k*). Therefore, a bankruptcy notice may issue for the costs due under a judgment (*l*), or for damages awarded for a tort (*l*).

The creditor must not himself have committed an act of bankruptcy, as in those circumstances a debtor cannot safely pay him (*m*).

Execution thereon not having been stayed.—“In order to entitle “a creditor to issue a bankruptcy notice he must be in a position “to issue execution on his judgment (against the proposed “bankrupt) at the time when he issues the bankruptcy notice “. . . from the collation of the words ‘final judgment’ and “‘execution thereon not having been stayed,’ a necessary

(*g*) *Ex p. Moore* (1885), 14 Q.B.D. 627.

(*h*) B.A. s. 5 (4) and see *post*, p. 000

(*i*) *Per A. L. SMITH, L.J.*, in *Re A Bankruptcy Notice*, [1898] 1 Q.B. 383.

(*k*) *Ex p. Moore* (1885), 14 Q.B.D. 627.

(*l*) *Ibid.* and *Re Burstead*, [1893] 1 Q.B. 199.

(*m*) *Re A Debtor*, [1912] 2 K.B. 533, and see *post*, p. 134.

"implication arises of this character, viz., that the creditor "must not merely have obtained final judgment, but must be "in a position to issue immediate execution upon it" (n).

In that case judgment had been obtained against a partnership firm, but an alleged partner, against whom a bankruptcy notice had been issued, had not been personally served with the writ nor had he appeared in his own name nor admitted that he was or had been adjudged a partner, and therefore by Order XLII, r. 10, execution could not issue against him without leave of the Court. Such leave had not been obtained, it was held that a bankruptcy notice could not be properly issued against him.

Similarly, it was held in *Ex p. Woodall* (o), that, where an executrix had not obtained leave to issue execution upon a judgment obtained by her testator under Order XLII, r. 23, she could not issue a bankruptcy notice.

Likewise, in other cases where leave is necessary before execution can issue, leave must be obtained before a bankruptcy notice can be issued.

Execution Stayed.—The words "execution thereon not having been stayed" apply not only to cases where there is an express stay by order of the Court, but also to cases of an implied stay, where some steps have been taken to enforce the judgment, but from the particular circumstances and steps taken no further execution can be levied. This arises in various ways.

First, where Execution is Levied by a Writ of Fieri-facias.—Where goods of the debtor have been seized and the sheriff has made no return to the writ, there is a stay, even if he has withdrawn (p).

But, where the goods seized were not those of the debtor and the sheriff withdrew upon a third party claiming them, but made no return, it was held that, as the sheriff could still levy under the existing writ on the goods of the debtor in his bailiwick or another writ could be issued in another county, there was no stay, and a bankruptcy notice could be issued (*ibid*).

Where, however, a third party claimed the goods which had

(n) *Per* BOWEN, L.J., in *Re Ide* (1886), 17 Q.B.D. 755.

(o) (1884), 13 Q.B.D. 479.

(p) *Re A Debtor*, [1902] 2 K.B. 260.

been seized to the amount of the debt by the sheriff, who then took out an interpleader summons, but before any order was made in the interpleader proceedings, or they were abandoned, a bankruptcy notice was issued, it was held that there was no power to issue or proceed to further execution and, therefore, there was a stay (*q*).

Similarly, in like circumstances, except that an order was made on the interpleader summons directing an issue and the payment into Court of the whole amount of the debt, it was held that, until the interpleader issue had been disposed of, execution had been stayed (*r*).

But in the case of *Re Bates* (*s*), where the judgment debt was over £400 but only £20 was ordered to be paid into Court by the interpleader order, it was held (*per* MATHEW, J., CAVE, J., concurring) that "the judgment was at any rate not stayed "except as to £20, and it would be the duty of the sheriff if "there were other goods in his bailiwick to levy for the balance," and, therefore, a bankruptcy notice could issue for the balance.

Secondly, where other Steps have been taken to Enforce the Judgment.—In *Re Bond* (*t*) a creditor obtained the appointment of a receiver of the debtor's share and interest in certain partnership assets. In holding that there was no stay and a bankruptcy notice would issue, PHILLIMORE, J., said:

"There has merely been equitable execution by means of a "receivership. There is nothing to prevent the 'creditors' "obtaining the appointment of other receivers, nor is there "anything to prevent the issue of a writ of *fi. fa.* . . . The "Court may inquire whether the equitable execution has in "any way prevented the debtor from paying his debt."

But, as the receiver was not in possession of any interest of the debtor's that could be sold nor of any of his money, the question did not arise.

In *Re Sedgwick* (*u*), the creditor had obtained a charging order upon certain shares belonging to the debtor during the seven days mentioned in the notice. Here Lord ESHER, M.R., referred to this question as

"a just equity which goes to the extent only that if a creditor "gives a notice requiring payment in seven days and actually

(*q*) *Re Phillips* (1888), 5 Mor. 40.

(*s*) (1887), 4 Mor. 192.

(*u*) (1888), 5 Mor. 262.

(*r*) *Re Ford* (1886), 18 Q.B.D. 369.

(*t*) [1911] 2 K.B. 988.

"and in fact prevents the debtor from paying, such creditor "cannot rely upon the notice and it will be set aside. The "question is whether in the eyes of any person of ordinary "fairness in business it will be said that the creditor has in a "business sense prevented the debtor from paying. . . . It "is not enough that he may have made it more difficult for him "to pay. He must have made it so difficult that as a matter "of business he could not pay. . . . It seems clear that the "owner of the goods attached can sell them if when sold he is "prepared to satisfy the attachment."

Therefore, it was held that the debtor had not brought himself within the equity, and the bankruptcy notice was not set aside.

It would seem from *Re Renison (a)* that if the attachment was subsisting at the time the notice was issued there would be no stay of execution.

In *Re Dennis (b)* during the seven days a judgment creditor of the debtor served the debtor with a garnishee order *nisi* attaching the debt due from him to the creditor, and Lord Esher, M.R., said:

"It is unnecessary to consider in this case whether the "service of a garnishee order *nisi* upon the judgment debtor "amounts to a stay of execution upon the judgment, because "it had not been served on him at the time of the service of "the bankruptcy notice. . . . The words are:

" 'If a creditor has obtained a final judgment against the "debtor, and execution thereon not having been stayed, has "served on him . . . a bankruptcy notice under this Act.'

"That is, execution thereon not having been stayed before "the service on him of the bankruptcy notice."

In dealing with the equity he said:

"If he (the debtor) had shown that he had ready money "to pay [the creditor], and was prevented from paying by [the "creditor's] act (*i.e.* his failure to pay his own debts). But he "has not shown that and could not have shown it. The onus "is on him to establish the equity."

In *Re Renison (supra)* a creditor before serving the bankruptcy notice obtained a garnishee order absolute attaching

(a) [1913] 2 K.B., at p. 302.

(b) (1888), 60 L.T. 348.

debts due to the debtor. It was held that "that does not preclude him from issuing execution; so neither does it preclude him from issuing a bankruptcy notice."

The creditor without taking any steps himself to enforce the judgment may find that execution thereon has been stayed so far as he is concerned.

This occurred in the case of *Re Connan* (c). There a judgment creditor of the creditor obtained a garnishee order absolute attaching the debt due to the creditor and ordering its payment to his judgment creditor, execution to issue in default of such payment. In holding that there was a stay, FRY, L.J., said:

"The garnishee order absolute which gave the right to levy execution upon the judgment to [the judgment creditor of the creditor] operated as a stay of execution on the judgment so far as [the creditor] was concerned."

Summary.—To recapitulate, it will be seen from the above cases:

1. That for a creditor to be entitled to issue a bankruptcy notice he must be in a position to issue immediate execution against the debtor on his judgment. But if he has not got this at the time of serving the notice, whether from
 - (a) failure to obtain any leave of the Court that may be necessary, or
 - (b) because the right to issue the execution has passed to another (as in the case of *Re Connan*, *supra*), or
 - (c) because there is some incomplete execution in existence that prevents the creditor proceeding to further execution under existing process or issuing a further process of execution,then he has lost his right to issue a bankruptcy notice.
2. But even if he has this right he may still be debarred from relying on the non-compliance with the bankruptcy notice as an act of bankruptcy, as he will have raised an equity against himself. if the debtor can prove affirmatively that the actions of the creditor have made it impossible as a matter of business for him to pay.

The two questions are separate and distinct, although if either are decided against the creditor his bankruptcy notice will be set aside.

Some further points on this act of bankruptcy require notice

Separate Judgments.—Separate judgments that have been obtained against a debtor may not be included in one notice (*d*). But where there is a single judgment against several joint debtors a bankruptcy notice may be issued against one without including the others (*e*).

Notice to Pay.—By s. 2 the notice must require the debtor to pay “in accordance with the terms of the judgment order,” and, therefore, if a judgment is controlled by some outside agreement a bankruptcy notice is ineffectual (*f*).

In *Re H.B.* (*f*) an agreement was made by which a judgment debt was to be paid by instalments; certain instalments were in arrears, and a bankruptcy notice, that was issued for the arrears under the agreement which were only part of the judgment debt, was set aside. But if the agreement stipulates that if default is made in payment of any instalments the whole amount should become due, it becomes due under the judgment, and a bankruptcy notice may issue for the whole amount unpaid under the judgment (*g*).

Interest.—Statutory interest on the judgment debt may, however, be included in the notice (*h*), and there is no need to deduct income tax from the interest (*i*).

Second Notice.—If a bankruptcy notice is issued and withdrawn a second notice may issue for any balance due, provided the necessary conditions exist at the time of its issue (*k*).

Compliance.—The debtor must either comply with the notice or satisfy the Court that he has a counterclaim, set-off, or cross-demand that equals or exceeds the judgment, and that could not have been set up in the action in which the judgment was obtained. The debtor must not only have been unable to set up the set-off, etc., in the action, but it must be a right enforceable by action at the time of the application to set aside

(*d*) *Re O. C. S.*, [1904] 2 K.B. 161.

(*f*) *Re H. B.*, [1904] 1 K.B. 94.

(*h*) *Re Lehman* (1890), 7 Mor. 181.

(*k*) *Ex p. Feast*, *supra*.

(*e*) *Re Low*, [1895] 1 Q.B. 734.

(*g*) *Ex p. Feast* (1887), 4 Mor. 37.

(*i*) *Re Cooper*, [1911] 2 K.B. 550.

the bankruptcy notice, and it is not sufficient that he has vested in him a right of set-off that would merely become effective under s. 31 (*l*) if he was adjudicated bankrupt (*m*).

To comply with the notice the debtor must within seven days pay the debt, or secure or compound it to the satisfaction of the debtor or the Court. "Where there is a binding agreement "for the discharge of the debt from which neither party can "recede, it is a compounding, though something still remains "to be done" (*n*).

If the debtor in pursuance of a bankruptcy notice gives security to the satisfaction of the creditor a fresh bankruptcy notice cannot issue pending the realisation of the security (*o*).

As there is no reported case of the Court forcing a creditor to accept a compounding or security with which he is not satisfied, the jurisdiction in this is obscure. If the debtor does not comply with the notice before the expiration of the last moment of the seventh day the act of bankruptcy is complete (*p*); and then not only the creditor who issued the notice but any creditor may present a petition relying on this as an act of bankruptcy (*q*), and this is so even if the judgment debt has been subsequently settled (*r*).

Summary.—For a creditor to be able to issue a bankruptcy notice he must

1. have a final English judgment, and
 2. at the date of serving the notice be in a position to issue execution upon it, and
 3. not have made it impossible for the debtor to pay him, and
 4. the judgment must not be controlled by an agreement.
- 8. If the debtor gives notice to any of his creditors that he has suspended, or is about to suspend, payment of his debts (Bankruptcy Act, s. 1 (1) (*h*)).**

Such a notice need not be in writing, but may be given verbally by the debtor to one of his creditors (*s*).

(*l*) See *post*, p. 270.

(*m*) *Re G. E. B.*, [1903] 1 K.B. 340.

(*n*) *Per* PATTESON, J., in *Rhodes v. Pennell* (1846), 9 Q.B., at p. 129.

(*o*) *Re Smith*, [1903] 1 K.B. 33.

(*p*) *Re Maud* (1891), 8 Mor. 144.

(*q*) *Ex p. Wier* (1871), L.R. 6 Ch. 875; *Ex p. Jay* (1873), L.R. 9 Ch. 133.

(*r*) *Re Powell*, [1891] 2 Q.B. 324.

(*s*) *Ex p. Nickoll* (1884), 13 Q.B.D. 469; *Re A Debtor*, [1929] 1 Ch. 362

The decisions on what amounts to a notice of suspension are decisions construing the particular words in each case and are sometimes apparently conflicting, but in the course of these decisions the following principles have been enunciated and can be applied generally.

"Any notice will be sufficient for the purposes of subs. (h) "which is expressed in terms calculated to convey to its recipients "the information that their debtor has suspended or is about "to suspend payment of his debts" (t).

"That you are not confined to the literal meaning of the "words used in order to ascertain whether they do amount "to a notice that a debtor is about to suspend; a statement by "a debtor that he cannot pay may in one set of circumstances "be merely a statement that he cannot pay, but in another set "of circumstances to which you are entitled to look for the "purpose of interpreting words that are not words of art, it "may clearly mean to any ordinary human listening to it that "he is stating that he has not the intention of paying his debts "when they become due" (u).

The notice, therefore, need not mention the word "suspension"; it is sufficient if it conveys that such is the debtor's intention.

"To 'suspend' in its natural signification rather means some- "thing which may not be permanent than that which is "necessarily so. A perpetual stoppage of payment would be "a suspension and something more" (a).

In *Clough v. Samuel* (b), Lord HALSBURY said: "Although "the statute does not require any particular form of notice "but still it must be a notice." And in the same case Lord ROBERTSON said:

"It seems to me that in the conception of subs. (h), with "which we have to deal, the suspension of his debts is a specific "and deliberate (in the sense of intentional) act of the debtor, "and the suspension, actual or intimated, must apply to all the "creditors. It is something different from over and above "inability to pay. It is one of several courses among which "a debtor may elect when he finds himself insolvent. A man "faced by a balance sheet which means certain and speedy ruin,

(t) *Per* Lord WATSON in *Crook v. Morley*, [1891] A.C. 316.

(u) *Per* GREER, L.J., in *Re A Debtor*, [1929] 1 Ch. 362, at p. 372.

(a) *Per* Lord SELBOURNE, *Crook v. Morley*, *supra*.

(b) [1905] A.C. 442.

"may try to arrange with his more pressing creditors, or he may put off the evil day and stagger on, leaving the stoppage of his career to be brought about by the action of others. Either of those courses is different from suspending payment of his debts."

VAUGHAN WILLIAMS, J., in *Re Scott* (c), said:

"I am convinced that subs. (h) is meant to apply to the case of a debtor dealing with his creditors as a body. If a debtor gives notice to one of his creditors that he cannot pay, and that he will deal with his creditors as a body, that will amount to a notice of suspension of payment; but the notice will not come within the section unless the debtor is dealing with his creditors as a body."

The subsection applies to both traders and non-traders (d). But

"the position of a non-trader is widely different from that of a trader, and for this reason: Business debts are based on credit given on a fixed principle, or on fixed times of payment, and a trader knows that, if he cannot meet his engagements periodically and methodically he will have to suspend payment. In the case of a non-trader, however, his debts, though no doubt payable *in presenti*, are not expected to be so paid, and payment is made according to the extent of credit allowed, which varies enormously in different cases" (e).

With this difference in view, a circular, which in the case of a trader would be construed as announcing suspension, when issued by a non-trader, may be construed as not meaning "anything more than that" the debtor "was anxious to come to some arrangement with his principal creditors."

A written notice within this subsection is not protected from being used to prove an act of bankruptcy through being expressed to be "without prejudice" (f).

It has been pointed out previously (*ante*, p. 27), that if in pursuance of a notice within this subsection a deed of assignment is executed, a creditor who has assented to the deed cannot rely on the deed as an act of bankruptcy nor on the notice (g), nor on any machinery to make the deed effective (h).

(c) [1896] 1 Q.B. 619.

(d) *Re Scott*, *supra*.

(e) *Per* PHILLIMORE, J., in *Re A Debtor* (1912), 106 L.T. 812.

(f) *Re Daintrey*, [1893] 2 Q.B. 116.

(g) *Re Hawley* (1897), 4 Mans. 41.

(h) *Re Woodroff* (1897), 4 Mans. 46.

But a creditor, who, although not bound by the deed, has by his conduct prevented himself from relying on the deed as an act of bankruptcy, can present a petition on an act of bankruptcy quite independent of the deed, *e.g.* a bankruptcy notice (*i*).

9. A Debtor's own Petition.—The filing by a debtor of his own petition is an act of bankruptcy (*k*), and even if the petition is withdrawn by leave of the Court, the mere filing still appears to remain an act of bankruptcy of which any creditor may avail himself.

3. PETITION

Further Requisites to a Petition.—Even if the debtor is a person who can be made bankrupt and has committed an act of bankruptcy, some further conditions must be complied with before a creditor can present a petition against him.

(*i*) *Date of Act of Bankruptcy.*—First, the act of bankruptcy on which the petition is grounded must have occurred within three calendar (*l*) months before the presentation of the petition (*m*). In calculating the three months the day on which such petition is filed must be excluded (*n*). A receiving order cannot be made on any earlier act of bankruptcy. An "available act of bankruptcy" means any act of bankruptcy upon which the petition on which a receiving order is made could have been grounded.

If the trustee of a deed of assignment for the benefit of the debtor's creditors generally serves on any creditor a notice intimating that the creditor will not be entitled, after the expiration of one month from the service of the notice, to present a bankruptcy petition relying on the execution of the deed or any other act committed by the debtor in the course of or for the purpose of the proceedings preliminary to the execution of the deed, then, unless the deed becomes void, the period within which the creditor so served may present a petition relying on any such act is further limited to within one month of the service of the notice (*o*).

(*i*) *Re Mills*, [1906] 1 K.B. 389. (*k*) B.A., s. 6.

(*l*) *Helsham-Jones v. Hennen*, [1915] H.B.R. 167.

(*m*) B.A. s. 4 (1) (c).

(*n*) *Re Hannon* (1887), 4 Mor. 98.

(*o*) Deeds of Arrangement Act, 1914, s 24, and see *ante*, p. 24.

(ii) *Amount of Petitioning Debt*.—Secondly, the debt owing to the petitioning creditor or, if two or more creditors join in a petition, the aggregate amount of the debts owing to the several petitioning creditors, must amount to £50 (*p*)

“Now, in order to have a good petitioning creditor’s debt “you must have that which may be the immediate subject “of an action at law or a suit in equity” (*q*).

“The sum must be a certain sum, certainly due and certainly “payable to the person who presents the petition” (*r*).

In *Ex p. Muirhead*(*q*) damages awarded against a co-respondent which had been ordered to be paid to the petitioner who undertook to pay them into Court immediately upon their receipt were held not to constitute a good petitioning creditor’s debt, as the Court could order how the damages were to be applied and apply the whole sum for the maintenance of the wife and children entirely excluding the petitioner (*s*).

(iii) *Date of Debt*.—Thirdly, the debt must have existed at the date of the act of bankruptcy (*t*) and must be a liquidated sum, payable either immediately or at some certain future time (*u*).

(iv) *Secured Creditor*.—Fourthly, if the petitioning creditor is a secured creditor he must, in his petition, either

(i) state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt; or

(ii) give an estimate of the value of his security.

In the latter case, he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him, after deducting the value so estimated, in the same manner as if he were an unsecured creditor (*a*).

If a secured creditor omits to comply with this subsection he does not thereby forfeit his security (*b*), but if a receiving

(*p*) B. A. s. 4 (1) (*a*).

(*q*) *Per* COCKBURN, L.C.J., in *Ex p. Muirhead* (1876), 2 Ch. D. 22.

(*r*) *Per* MELLISH, L.J., *ibid*.

(*s*) See also *Re A Debtor* (No. 76 of 1929), [1929] 2 Ch. 146.

(*t*) *Ex p. Hayward* (1871), L.R. 6 Ch. 546.

(*u*) B.A. s. 4 (1) (*b*).

(*a*) B.A. s. 4 (2).

(*b*) *Moor v. Anglo-Italian Bank* (1879), 10 Ch. D. 681.

order or adjudication followed on such secured creditor's petition either would be liable to be set aside if the petition was not amended (c).

The Court has power to make amendments in a petition even after a receiving order has been made (d), and where a security of no value was inadvertently omitted, such an amendment was made in the case of *Re A Debtor* (e), and the receiving order upheld.

If the estimate is a real estimate and not a mere sham, the Court will not inquire whether it is right (f). If, however, the petitioning creditor does not prove for a dividend the trustee cannot compel redemption of the security (g) by paying him his estimate (h), "yet he is bound in the sense, that he cannot "take any benefit in the administration in bankruptcy except "on the basis of that estimate" (i), and in such a case it is doubtful if he can amend his estimate in any circumstances even if it was made under a mistake as to its value (k).

The Petition.—A creditor's petition must allege:—

- (i) the residence and place of business, if he carries on a business, during the greater part of the past six months, so that the particular Court may see that the bankruptcy is within its jurisdiction pursuant to s. 98 (l). If these addresses differ from the addresses at the date of contracting the petitioning debt, then the addresses at that date also;
- (ii) that the debtor is just and truly indebted to the petitioner and the amount of the debt; and
- (iii) the act or acts of bankruptcy upon which reliance is placed.

The allegations in the petition must be verified by an affidavit

(c) *Ibid.*, at p. 689.

(d) *Lovell and Christmas v. Beauchamp*, [1894] A.C. 607.

(e) *Re A Debtor*, [1922] 2 K.B. 109.

(f) *Re Button*, [1905] 1 K.B. 602.

(g) For rights of trustee to redeem, see *post*, p. 259.

(h) *Re Vautin*, [1899] 2 Q.B. 549; *Re Button*, *supra*.

(i) *Per* VAUGHAN WILLIAMS, L.J., in *Re Button*, *supra*.

(k) *Re Button*, *supra*, and for amendment of estimate in a proof of debt, see p. 260.

(l) See *ante*, p. 33.

of the petitioner or of some one person on his behalf having knowledge of the facts (*m*).

This affidavit cannot be used on the hearing of the petition. It is only an affidavit for the purpose of getting leave to file a petition in bankruptcy (*n*).

The petition must be served personally on the debtor, but in proper cases substituted service can be ordered (*o*).

The service of the petition is proved by filing in the Court forthwith after the service an affidavit of service (*p*).

If the debtor intends to dispute any of the statements in the petition he should file with the registrar of the Court a notice, and send by post a copy to the petitioning creditor and, if known, his solicitor, specifying the statements so disputed (*q*).

The officials of the Court register the filing of the petition in the Land Registry (*r*).

Interim Receiver.—After a petition has been presented against a debtor and before a receiving order has been made, the Court may, if it is shown to be necessary for the protection of the estate, appoint the Official Receiver to be interim receiver of the property of the debtor or of any part thereof, and direct him to take immediate possession thereof or of any part thereof (*s*. 8).

Whilst interim receiver the Official Receiver can appoint a special manager in the like circumstance in which he can appoint one when receiver (*s*).

Also, the Court at any time after the presentation of a bankruptcy petition may stay any action or execution or other legal process against the property or person of the debtor (*t*), and the Court in which the proceedings are pending may either stay them or allow them to continue on such terms as it thinks just.

The Hearing of Petition.—The petition then comes on for hearing usually not earlier than eight days from the service thereof (*u*), and at the hearing the Court will require proof:

(*m*) B.A. s. 5 (1).

(*o*) B.R. 156.

(*r*) Land Charges Act, 1925, s. 3 (2).

(*s*) *Re A. B. & Co.* (2), [1900] 2 Q.B. 429, see *post*, p. 89.

(*t*) B.A. s. 9 (1), and see *post*, p. 82.

(*u*) B.R. 166.

(*n*) *In Re A Debtor*, [1910] 2 K.B. 59, at p. 62.

(*p*) B.R. 157.

(*q*) B.R. 169.

- (1) of the debt of the petitioning creditor;
- (2) of the service of the petition; and
- (3) of the act of bankruptcy, or if more than one is alleged in the petition, one of them;

and if satisfied with the proof may make a receiving order (a) in pursuance of the petition (b).

Of these three matters only the first requires further consideration here.

Proof of Petitioning Debt.—In considering whether a good petitioning creditor's debt has been proved, the registrar can look into the consideration for the debt, even a judgment debt.

"It is a well-settled rule, on which we have always acted, "that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obvious reasons for this, "because the object of the bankruptcy law is to procure the "distribution of a debtor's goods among his just creditors. If "a judgment were conclusive, a man might allow any number "of judgments to be obtained by default against him by his "friends or relations without any debt being due to them at "all: it is therefore necessary that the consideration for the "judgment should be liable to investigation" (c).

And this is so even if the debtor not merely allows a judgment to go by default but actually consented to it.

"Although the judgment is binding upon him (the debtor) "by reason of his consent and of its being the judgment of the "Court, yet no such estoppel is effectual against the Court of "Bankruptcy. The Court is not estopped by the conduct of "the parties, but has a right to inquire into the debt" (d).

"It has long been established as regards the proof of a debt "in bankruptcy, that the trustee acting on behalf of the creditors "can go behind a judgment. . . . That only is founded on the "principle—that under whatever circumstances a judgment may "have been obtained against the bankrupt. Yet no act of his "—collusion, compromise improperly entered into or anything "else—ought to prejudice the rights of the other creditors, "because the assets ought to be distributed in bankruptcy only

(a) For the effect of a receiving order, see *post*, p. 84.

(b) B.A. s. 5 (2).

(c) *Per* JAMES, L.J., in *Ex p. Kibble* (1875), L.R. 10 Ch. 373.

(d) *Per* Esher, M.R., in *Ex p. Lennox* (1885), 16 Q.B.D., at p. 323.

"amongst the honest *bonâ fide* creditors of the bankrupt. . .
 "I think that, if the Court is satisfied that the claim (for a
 "receiving order) is made in respect of something which would
 "give the claimant no right of proof in the bankruptcy, and no
 "right to come in as a creditor in the bankruptcy, it ought not
 "to make a receiving order" (e).

And this is so even if the judgment has been affirmed on appeal (f).

Where a receiving order is sought in respect of a judgment debt obtained by a moneylender, the registrar can give relief under the Moneylenders Acts 1900 to 1927, although they have not been pleaded in the action (g); but if after investigation and allowances for the relief given a debt of £50 or more remains a receiving order will follow (h).

It is in the registrar's discretion whether he will go behind the judgment and investigate the matter or not, and some grounds must be shown for his so doing (i); but if the suggested grounds are frivolous the registrar should refuse (k). It should be shown that there has been fraud, collusion, mistake, or some miscarriage of justice (l), nor should the discretion be used to go behind a judgment upon a nice balance of evidence if the judgment was originally permitted to be taken upon a real and genuine consideration of the facts by the tribunal (m), nor will it go behind a compromise that was entered into by parties represented by separate counsel, unless the compromise was improper or entered into without a full knowledge of the facts (n).

"Under this section (s. 5) it is not the province of the Registrar
 "to adjudicate whether there is a valid debt: his business is to
 "determine whether he shall make a receiving order, and for
 "this purpose he is entitled to go behind the judgment. But
 "he would have no power to set aside the judgment or to stay
 "execution upon it . . . all that he can do is to refuse to make
 "a receiving order in respect of the judgment debt" (o).

Such questions often arise where the act of bankruptcy alleged is the non-compliance with a bankruptcy notice. In

(e) *Per* COTTON, L.J., *ibid.*, at pp. 325, 328

(f) *Re Fraser* (1892), 9 Mor. 256. (g) *Re A Debtor*, [1903] 1 K. B. 705.

(h) *Re A Debtor*, [1917] 2 K.B. 60. (i) *Re Lipscombe* (1887), 4 Mor. 43.

(k) *Re Saville* (1887), 4 Mor. 277. (l) *Re Flatau* (1888), 22 Q.B.D. 83.

(m) *Re Turvey*, [1918-19] B. & C. R. 128.

(n) *Re A Debtor* (1928), 65 L.J. 358.

(o) *Per* ESHER, M.R., in *Re Vitoria*, [1894] 2 Q.B. 387.

such a case the refusal of a registrar to make a receiving order is a *res judicata* as regards that particular bankruptcy notice, but not as regards the judgment debt; and a fresh bankruptcy notice can be issued in respect of the same judgment debt and a fresh petition filed; but if such a proceeding is purely vexatious it will not be entertained by the Court (*p*).

Dismissal of Petition.—The Court may dismiss the petition:

- (a) if any one of the three above-mentioned points, *i.e.* debt, act of bankruptcy, or service of the petition are not proved; or
- (b) if it is satisfied that the debtor is able to pay his debts; or
- (c) that for other sufficient cause no order ought to be made (*q*).

The first two cases need no comment.

Discretion to Dismiss.—What in the discretion of the Court amounts to sufficient cause must depend upon the facts in each case.

It is not sufficient cause to dismiss a petition if at the time of the hearing of the petition it appears that the debtor has no assets (*r*), or that they are so small that they will be absorbed by the costs of the bankruptcy proceedings (*s*), as it is impossible for the Court to know at that stage whether there will be any, or the amount of the assets (*t*), and assets may be got in by the trustee that could not otherwise be obtained (*u*); nor is it sufficient cause because there is only one creditor (*a*).

But it is sufficient if it is proved (and the mere affidavit of the petitioner is insufficient for this purpose (*b*)), that the making of a receiving order will destroy the debtor's only asset, a life interest ceasing on bankruptcy (*c*), or that the debtor was undischarged under a previous bankruptcy from which it appeared that there were neither assets or the prob-

(*p*) *Re Vitoria*, [1894], 2 Q.B. 387. (*q*) B.A. s. 5 (3).

(*r*) *Re Leonard*, [1896] 1 Q.B. 473. (*s*) *Re Jubb*, [1897] 1 Q.B. 641.

(*t*) *Re Leonard*, *supra*.

(*u*) *Re Hecquard* (1889), 24 Q.B.D. 71; see Chaps. 6 and 8 on assets not belonging to bankrupt that pass to trustee.

(*a*) *Re Hecquard*, *supra*.

(*b*) *Re Birkin* (1896), 3 Mans. 291.

(*c*) *Re Otway*, [1895] 1 Q.B. 812.

ability of assets (*d*); or that a petitioning creditor used a petition for collateral and inequitable purposes, *e.g.* extorting bonuses above the amount of the debt for adjournments (*e*). In such cases the Court will not make a receiving order.

In the case of *Re Shaw* (*f*) the petitioning creditors offered to assent to a deed of composition if the debtor secretly gave them more than their share of the composition, and in the case *RIGBY*, L.J., said:

"To use, or even attempt to use, bankruptcy proceedings for the purpose of fraud or extortion, although the attempt may fail, is a sufficient cause for refusing on the petition of that creditor to make a receiving order. . . . A debt that has been used as a means of extortion cannot afterwards be made use of as a means of getting a receiving order."

But where a creditor openly demands special terms as the price of his consent to a deed of composition he is entitled to enforce his debt by any legal means, including obtaining a receiving order (*g*).

When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure, or compound for a judgment debt, or sum, ordered to be paid, the Court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment or order (*h*). It has been held (*i*) that where the appeal is *bonâ fide* the petition should be stayed generally, with liberty to apply and where it is obviously frivolous a receiving order should be made.

Stay of Proceedings.—Where the debtor appears on the petition, and denies either that he is indebted to the petitioner, or that the debt is of such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as the Court may require for payment to the petitioner of any debt which may be established against him in due course of law, and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt (*i*).

(*d*) *Re Betts*, [1897] 1 Q.B. 50. As to powers of trustee obtaining bankrupt's after-acquired property for the benefit of the creditors, see pp. 221-227.

(*e*) *Ex p. King* (1876), 3 Ch. D. 461. (*f*) (1901), 83 L.T. 754.

(*g*) *Re Sunderland*, [1911] 2 K.B. 658. (*h*) B.A. s. 5 (4).

(*i*) *Ex p. Heyworth* (1884), 14 Q.B.D. 49; *Re French* (1889), 6 Morr. 258.

When proceedings are stayed the Court may, if by reason of the delay caused by the stay of proceedings or for any cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid (*k*).

Withdrawal of Petition.—A creditor's petition must not, after presentation, be withdrawn without leave of the Court (*l*).

Debtor's Petition.—So far we have dealt only with proceedings on a creditor's petition, but a debtor may present his own petition.

He must, like a creditor, present it to the Court having jurisdiction under s. 98 (*m*), and in it must state not only his name and description and present address, but also the addresses of all places of residence or business at which he has incurred debts and liabilities which remain unpaid or unsatisfied at the date of the petition (*n*).

It shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the Court shall thereupon make a receiving order (*o*).

Discretion to make a Receiving Order.—It will be noted that the section of the Act is imperative and gives no grounds upon which the Court may refuse to make a receiving order on a debtor's petition; but that the Court has such power was decided by CAVE, J., in the case of *Re Bond* (*p*), who there said:

"Now having regard to that section it is undoubtedly the
 "imperative duty of the Court to make a receiving order where
 "the petition is a proper petition: but where the petition is . . .
 "an abuse of process of the Court . . . the Court has power
 "to refuse to make a receiving order, and when it appears that
 "a receiving order has been wrongfully made to rescind it."

In that case a husband and wife, who were neither partners in trade nor had any joint liabilities, and the husband had no assets at all, filed a joint petition the result, if the receiving

(*k*) B. A. s. 5 (6).

(*m*) See *ante*, pp. 33, 75.

(*o*) B.A. s. 6; B.R. 166 (1).

(*l*) B.A. s. 5 (7).

(*n*) B. R. 146.

(*p*) (1888), 21 Q.B.D. 17.

order had stood, would have been that, although there were two entirely separate bankruptcies, the revenue would have received only one set of fees, and the costs of the husband's bankruptcy would have fallen on the wife's assets to the detriment of her creditors.

In the case of *In re Painter* (q) a debtor with assets of £11 odd and an inalienable pension that could not pass to the trustee filed his own petition to evade a judgment summons (r) taken out by his only large creditor. He had not previously been bankrupt, and this was held not to be an abuse of process of the Court.

But where the debtor was undischarged under three previous bankruptcies, in two of which the debtor obtained the receiving order on his own petition to avoid imprisonment under a committal order made on a judgment summons and had had a fourth receiving order set aside on the grounds that there were no assets (s), the Court held that for the debtor to obtain yet another receiving order on his own petition to evade a further judgment summons was an abuse of the Court's process (t).

Withdrawal of Petition.—A debtor's, like a creditor's petition, shall not, after presentation, be withdrawn without leave of the Court (u).

4. RECEIVING ORDER

The effect of a Receiving Order—(i) *Effect on Property.* On the making of a receiving order an Official Receiver is thereby constituted receiver of the property of the debtor (a).

This does not divest the debtor of any of his property (b). Consequently, the entry into possession of the Official Receiver does not disturb the rights and liabilities under existing contracts, and he is therefore in no better position than the bank-

(q) [1895] 1 Q.B. 85.

(r) On a judgment summons an order can be made for the debtor to pay so much of the judgment debt as he has means to pay and the rest by instalment within his means, and if he does not pay thus he can be committed to prison. By this means he could have been forced to pay over some of his pensions

(s) See *Re Betts*, [1897] 1 Q.B. 50, and *ante*, p. 82.

(t) *Re Betts*, [1901] 2 K.B. 39. (u) B.A. s. 6 (2).

(a) B.A. s. 7 (1).

(b) *Rhodes v. Dawson* (1886), 16 Q.B.D. 548.

rupt; for example, he is in no sense a new owner or occupier of the bankrupt premises, and therefore has no right, as an incoming tenant would have, to be supplied with gas without first paying the bankrupt's arrears (*c*). But upon adjudication the trustee is in the position of a new tenant, and was held in *Re Flack* (*d*) to be entitled to water without payment of the arrears.

(ii) *Stay of Proceedings*.—From the time the order is pronounced (*e*) no creditor, to whom the debtor is indebted in respect of any debt provable in bankruptcy, shall have any remedy against the property or person of the debtor in respect of the debt or shall commence any action or other legal proceedings unless with the leave of the Court and on such terms as the Court may impose (*f*).

This protection applies only against creditors whose debts are provable in bankruptcy (*g*), therefore other debts, *e.g.* alimony, may be enforced by an order for committal to prison on default in payment (*h*).

Nor is the debtor immune from imprisonment for failure to pay the debts mentioned in s. 4 of Debtors Act, 1869 (*i*), as the imprisonment is partly punitive in those cases, and the protection given by s. 7 affects remedies intended to enforce payment only (*k*). Although imprisonment on a judgment summons is punishment for the contempt of Court in not

(*c*) *Re Smith*, [1893] 1 Q.B. 323.

(*d*) [1900] 2 Q.B. 32.

(*e*) *Re Manning* (1885), 30 Ch. D. 480.

(*f*) B.A. s. 7 (1).

(*g*) For these, see *post*, pp. 266-270.

(*h*) *Linton v. Linton* (1885), 15 Q.B.D. 239.

(*i*) The exceptions to immunity from imprisonment dealt with by this section are:

- (1) Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract.
 - (2) Default in payment of any sum recoverable summarily before a justice or justices of the peace.
 - (3) Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control.
 - (4) Default by an attorney or solicitor in payment of costs when ordered to pay costs for misconduct as such, or in payment of a sum of money when ordered to pay the same in his character of an officer of the Court making the order.
 - (5) Default in payment for the benefit of creditors, of any portion of a salary or other income in respect of the payment of which any Court having jurisdiction in bankruptcy is authorised to make an order.
- (*k*) *Re Smith*, [1893] 2 Q.B. 32.

obeying an order to pay a sum he is able to pay and does not discharge the debt, this is dealt with in s. 5 of the Debtors Act, and the debtor is immune (*l*).

Secured Creditors.—Just as the immunity from remedies against the person of the debtor is partial, so is the immunity of his property, for by s. 7 (2) it is enacted that

this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.

A secured creditor means a person holding a mortgage, charge, or lien on the property of the debtor or any part thereof as security for a debt due to him from the debtor (*m*). The creditor's title, however, must have accrued before the act of bankruptcy to which the trustee's title relates (*n*).

Execution Creditors.—Also execution creditors are by s. 40 deprived of the benefit of the execution unless the execution is completed before the date of the receiving order and before notice of the presentation of a petition or of the commission of any available act of bankruptcy (*o*). An execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver (*p*).

Assignments.—Similarly, if a mere licence to seize (as distinct from an assignment) is not executed before the act of bankruptcy to which the trustee's title relates, it is determined by the bankruptcy (*q*), and the property subject to seizure passes to the trustee.

This distinction is of importance in cases of a security which covers property of a debtor to be acquired in the future. "In order that the assignment may survive and have its effect it must give to the assignee something more than a mere right 'in contract, something in the nature of an estate or interest' (*r*). As Lord WESTBURY, L.C., said in *Reeve v. Whitmore* (*s*):

(*l*) *Re Edgcombe*, [1902] 2 K.B., at pp. 410-411.

(*m*) B.A. s. 167.

(*n*) See Chap. 6.

(*o*) "Available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made (s. 167).

(*p*) Section 40 (2), see p. 147, *post*.

(*q*) *Thompson v. Cohen* (1872), L.R. 7 Q.B. 527 at p. 534.

(*r*) *Per* PHILLIMORE, L.J., in *Re Lind*, [1915] 2 Ch. 345, at p. 314.

(*s*) (1863), 33 L.J. Ch. 63.

"It is the difference between a present contract that the mortgagee should have a right and an interest attaching immediately by force of the contract upon all that property which, in future, might be brought on the premises and a contract that the mortgagee should have the power of entering upon the premises for the purpose of seizing and taking possession of that property."

If the right is to enter and seize and thereby perfect the title, the right is in contract only, and a breach only gives a right of proof in the bankruptcy and the debtor is released from further liability under such contract by his discharge; if, on the other hand, it passes an interest, it is excepted from the bankruptcy laws by being a security within s. 7 (2) (t).

It must be remembered that although property not yet acquired is not capable of assignment at law, it is in equity, for, as Lord MACNAUGHTON said, in *Tailby v. Official Receiver* (u):

"The mode or form of the assignment is absolutely immaterial provided the intention of the parties is clear (a). To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence (on the principle that equity considers as done that which ought to be done [at p. 546], if it is of such a nature and so described as to be capable of being ascertained and identified."

In the case of *In re Lind* (b) Lind gave two mortgages of his share under the expected intestacy of his mother, then he became bankrupt, the mortgagees did not prove and he received his discharge, after which he granted a third mortgage of his share. Held, on the above principles, that on the death of his mother intestate the first two mortgages were not discharged by the bankruptcy, but attached to the property and therefore ranked in priority to the third mortgage (c).

(t) See BANKES, L.J., in *Re Lind*, *supra*, at pp. 371, 372.

(u) (1888), 13 A.C. 523, at p. 543.

(a) In the cases which fall within the Bills of Sale Acts, the requirements of these Acts as to form and registration must be complied with.

(b) [1915] 2 Ch. 345.

(c) *Collyer v. Isaacs* (1881), 19 Ch. D. 342, has been considered as an authority contrary to the above exposition of the law on this point, but having regard to the way in which the case was explained and distinguished in *In re Lind* (*supra*), and the principles enunciated in *Tailby v. Official Receiver* (*supra*), this case can, in the opinion of the authors, be no longer regarded as of general application, but an authority only on the particular documents and facts of that case.

Besides those cases in which the intention of the parties, irrespective of the form of expression used, is construed as a mere license to seize, there are others in which the assignee does not receive an interest attaching to the property, but only "a mere right in contract" that does not oust the trustee's title.

An example of this is found in the attempted assignment or of charge on profits of a business to be made after the assignment and after the act of bankruptcy to which the trustee's title relates (*d*).

Where, however, the bankrupt had lent goods on hire-purchase agreements and assigned the right to receive the instalments under these agreements prior to the bankruptcy, the assignment was held good against the trustee in bankruptcy (*e*).

The principle governing these cases is well stated by RIGBY, L.J., in *Wilmot v. Alton* (*f*), at p. 22:

"It is an important distinction, for the present purpose, "between cases in which, the consideration for the contract "having been wholly executed by the bankrupt on his part, a "sum of money becomes due to him under the contract, and "cases of executory contracts in which the money will not be "earned under the contract unless the person contracting "continues to carry on business and fully performs his part of "the contract which has only been partially performed at the "date of the bankruptcy. In the latter class of cases the bankrupt cannot create greater rights in favour of an assignee "from him than he has himself: it rests with the trustee to say "whether the business is to be carried on and the contract "performed or not, and, if he elects to perform it, he has a right "to the consideration for such performance when it becomes "due."

Assignment of after-acquired property in the special case of marriage settlement must not only be considered in regard to the above principles, but also in regard to s. 42 (2) and (3) (*g*).

By s. 59 there is a further limitation upon the rights of a creditor who holds any goods of the debtor by way of pledge, pawn, or other security. In such a case the Official Receiver

(*d*) *Ex p. Nichols* (1883), 22 Ch. D. 782, at pp. 785, 786.

(*e*) *Re Davis & Co.* (1888), 22 Q.B.D. 193.

(*f*) [1897] 1 Q.B. 17.

(*g*) See p. 210.

or trustee may, after giving notice in writing of his intention to do so, to inspect the goods, and, where such notice has been given, the creditor is not entitled to realise his security until he has given the trustee a reasonable opportunity of inspecting the goods and of exercising his right of redemption if he thinks fit to do so.

But it must be remembered that neither the Official Receiver nor the trustee have any right to redeem unless the creditor has put in a proof valuing his security (*h*).

Notice to the Board of Trade.—Whenever a receiving order is made the registrar must forthwith give notice of it to the Board of Trade and a notice, stating the name, address, and description of the debtor, the date of the order and of the petition and the Court by whom the order is made, is advertised in the *London Gazette* and a local paper (*i*). A receiving order, like a petition, is registered in the Land Registry (*k*).

Appointment of a Manager.—On the application of any creditor if satisfied that the nature of the debtor's estate or business or the interest of the creditors generally require the appointment of a special manager other than the Official Receiver, the Official Receiver of a debtor's estate may in his discretion, with which the Court will not interfere (*l*), appoint such manager to act until a trustee is appointed. Such manager may have such power including any of the powers of a receiver as the Official Receiver may entrust to him (*m*). If no such manager is appointed the Official Receiver acts as manager. The further duties of the Official Receiver are set out later (*n*).

Redirection of the Debtor's Letters.—When a receiving order has been made the Court, on the application of the Official Receiver or trustee, may from time to time order that for such time as the Court thinks fit, but not exceeding three months, all post, letters, telegrams and other postal packets addressed to the debtor at any places mentioned in the order, shall be delivered by the Post Office officials to the Official Receiver or the trustee or otherwise as the Court directs, and the same shall be done accordingly (*o*).

(*h*) B.A. Sched. I, rr. 10, 12, and Sched. II, rr. 10-13, and see *post*, p. 255.

(*i*) B.A. s. 11; B.R. 186.

(*k*) Land Charges Act, 1925, s. 7 (2).

(*l*) *Re A. B. & Co. (No. 2)*, [1900] 2 Q.B. 429. (*m*) B.A. s. 10 (1).

(*n*) See *post*, pp. 113, 114, 117. (*o*) B.A. s. 24.

Rescission of a Receiving Order.—There are four cases in which a receiving order may be rescinded by the Court:

- (1) Where the receiving order ought not to have been made (*p*).
- (2) Where the Court sanctions a composition or scheme under s. 16 (*q*).
- (3) The Court has a general jurisdiction under s. 108 (1) to review, rescind, or vary any of its orders, and under this jurisdiction will rescind a receiving order where the debtor or some one on his behalf has paid his debts in full (*r*).

But where the debts are not paid in full the matter should be arranged by scheme or composition under s. 16, and apart from this the Court will only exercise its discretion in exceptional circumstances where there has been no misconduct on the part of the debtor either in the way in which he has carried on his business or otherwise in relation to his insolvency, and after the exercise of the greatest possible vigilance for the protection of the interests of the creditors and the public (*s*).

- (4) Where it appears to the Court by which the order was made, upon an application by the Official Receiver or any creditor or other person interested, that a majority of the creditors in number and value are resident in Scotland or in Ireland, and that from the situation of the property of the debtor, or other causes, his estate and effects ought to be distributed among the creditors under the law relating to bankruptcy in Scotland or Ireland, the Court, after such enquiry as it may think fit, may rescind the receiving order and stay all proceedings on, or dismiss upon such terms, if any, as the Court may think fit (*t*).

(*p*) See *ante*, pp. 81, 83.

(*q*) See *post*, p. 94.

(*r*) *Re Wemyss* (1884), 13 Q.B.D. 244. (*s*) *Re Izod*, [1898] 1 Q.B. 241.

(*t*) B.A. s. 12.

CHAPTER 4

PROCEEDINGS FROM RECEIVING ORDER TO ADJUDICATION, INCLUDING COMPOSITIONS AND SCHEMES OF ARRANGEMENT

THE proceedings from receiving order to adjudication vary according to the course adopted by the creditors, who may either:

- (1) accept a composition or scheme of arrangement without adjudication; or
- (2) accept a composition or scheme after adjudication and the bankruptcy be annulled; or
- (3) the debtor is adjudicated bankrupt, with all its consequences.

Statement of Affairs.—But in any case the debtor must make out and submit to the Official Receiver a statement of his affairs in the prescribed form, verified by affidavit, showing particulars of his assets, debts, and liabilities, names, addresses, and occupation of his creditors and of any securities held by them respectively, and the dates when they were given, and also such further information as may be prescribed or required by the Official Receiver. This must be done—

- (1) within three days of the making of the receiving order, if made on the debtor's petition; or
- (2) within seven days of the receiving order, if made on a creditor's petition,

but in either case the Court may for special reasons extend the time (a).

It is, however, provided that, when the debtor cannot himself prepare a proper statement of affairs, the Official Receiver may, subject to any prescribed conditions, and at the expense of the estate, employ some person or persons to assist in the preparation of the statement of affairs (b).

(a) B.A. s. 14 (1), (2).

(b) B. A. s. 74.

The Official Receiver has power to require the debtor to furnish him with trading and profit and loss account, and a cash and goods account for any period not exceeding two years prior to the receiving order, and the Court has power to order such accounts to be furnished for any longer period that it thinks fit (c).

Inspection of Statement.—Any person stating himself in writing to be a creditor of the bankrupt may, personally, or by agent, inspect the statement at all reasonable times, and take any copy thereof or extract therefrom, but any person untruthfully so stating himself to be a creditor shall be guilty of contempt of Court, and shall be punishable accordingly on the application of the trustee or Official Receiver (d).

Meetings of Creditors.—*First Meetings of Creditors.*—As soon as may be (s. 13), but usually for a date after the statement of affairs should have been lodged, but not later than fourteen days after the making of the receiving order (e), a first meeting of creditors is held. This is summoned by the Official Receiver, giving six clear days' notice of the time and place of the meeting both in the *London Gazette* and in a local paper (f); and also the Official Receiver, as soon as practicable, gives a like notice to each creditor, named in the statement of affairs, together with a summary of the statement of affairs, including the causes of failure and such observations thereon as he may think fit to make.

But failure by the Official Receiver to give such notice or summary shall not invalidate the proceedings (g). The Official Receiver or his nominee shall be the chairman at the first meeting of creditors (h).

Other Meetings of Creditors.—The Official Receiver or the trustee may summon a meeting of creditors, and must do so whenever so directed by the Court or the creditors pass a resolution requiring a meeting or a creditor with the concurrence of one-sixth in value of the creditors (including himself) request a meeting (i). The chairman is appointed by a resolution of the meeting (k).

(c) B.R. 325.

(e) B.A. Sched. I, r. 1.

(g) B.A. Sched. I, r. 3.

(i) B.A. s. 79 (2), Sched. I, r. 5.

(d) B.A. s. 14 (4).

(f) B.A. Sched. I, r. 2.

(h) B.A. Sched. I, r. 7.

(k) B.A. Sched. I, r. 7.

VOTING.—Before a creditor can vote he must have lodged a proof of a debt provable in bankruptcy before the time appointed for the meeting (*l*), and his proof must have been admitted. The chairman of the meeting has power to admit or reject proofs for the purpose of voting, but his decision is subject to appeal to the Court. If he is in doubt whether he should admit or reject the proof, he must mark the proof as objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained (*m*).

A secured creditor, unless he surrender his security and thereby become an unsecured creditor, must in his proof give particulars of his security and value it, and he is then entitled to vote only in respect of the balance (*n*).

If the creditor's debt is in respect of a current bill of exchange or promissory note, he is not entitled to vote unless he is prepared to treat every person liable on it antecedently to the debtor as security in his hands, and for the purpose of voting, but not of receiving dividend, he must value such security (*o*).

A creditor may either vote in person or by proxy (*p*).

Resolutions—An *ordinary resolution* is one passed by a majority in value of the creditors present personally or by proxy at the meeting and voting on the resolution (*q*).

A *special resolution* is one decided by a majority in number and three-quarters in value so present and voting (*q*).

"*Resolution*" means ordinary resolution (*q*).

The creditors by an ordinary resolution can, *inter alia*:—fix the amount of a trustee's or special manager's remuneration; appoint or remove a trustee or member of a committee of inspection; resolve that the debtor be adjudicated bankrupt. A special resolution is required to appoint a trustee other than the Official Receiver in a summary administration; remove a special manager; or make an allowance in kind to the bankrupt.

The Duties of the Debtor.—The debtor shall, unless prevented by sickness or other sufficient cause, attend the first

(*l*) B.A. Sched. I, r. 8.

(*n*) B.A. Sched. I, r. 10.

(*p*) B.A. Sched. I, r. 15.

(*m*) B.A. Sched. I, r. 14.

(*o*) B.A. Sched. I, r. 11.

(*q*) B.A. s. 167.

meeting of his creditors, and submit to such examination and give such information as the meeting may require (r).

He shall give such inventory of his property, such list of his creditors and debtors, and of the debts due to and from them respectively, submit to such examination in respect of his property or his creditors, attend such other meetings of his creditors, wait at such times on the Official Receiver, special manager, or trustee, execute such powers of attorney, conveyances, deeds, and instruments, and generally do all such acts and things in relation to his property and the distribution of the proceeds amongst his creditors, as may be reasonably required by the Official Receiver, special manager, or trustee, or may be prescribed by general rules, or be directed by the Court by any special order or orders made in reference to any particular case, or made on the occasion of any special application by the Official Receiver, special manager, trustee, or any creditor or person interested (s).

If he fails to deliver up possession of any property in his possession or control to the Official Receiver or trustee or any other person authorised by the Court to take possession, he is guilty of contempt of Court in addition to any other punishment (t).

If he is adjudged bankrupt he shall aid to his utmost in the realisation of his property and the distribution of the proceeds amongst his creditors. (u)

Public Examination.—Where a receiving order is made the Court shall hold a public sitting for the examination of the debtor as to his conduct, dealings, and property (a). The debtor shall attend the sitting unless he is a lunatic or suffers from such mental or physical affliction or disability as in the opinion of the Court renders him unfit to attend his public examination. In such a case the Court may dispense with his public examination or make an order for his examination on such terms and in such manner and at such place as it seems expedient (b). The examination, which may be adjourned

(r) B.A. s. 22 (1).

(s) B.A. s. 22 (2).

(t) B.A. s. 22 (4).

(u) B.A. s. 22 (3).

(a) B.A. s. 15 (1).

(b) B.A. s. 15 (10). In one other case the attendance of a debtor for public examination can be dispensed with, *i.e.* joint debtors proposing a scheme or composition and one of them is unavoidably prevented from attending from illness or absence from the United Kingdom (B.A. s. 16 (7)), see *post*, p. 98.

from time to time, is held as soon as is convenient after the time for the submission of the debtor's statement of affairs (*c*).

At the examination the debtor is examined on oath as to his conduct, dealings, and property, and he must answer all such questions as the Court may put or allow to be put to him (*d*). Such notes of the examination as the Court thinks proper shall be taken down in writing and shall be either read over to or by the debtor and signed by him. These notes may be inspected by any creditor at all reasonable times and may be used in evidence against him, except in certain criminal cases (*e*), but not against his trustee (*f*), nor against any party except the debtor himself (*g*), even in the same bankruptcy.

When the Court is of opinion that the affairs of the debtor have been sufficiently investigated, it shall by order declare that his examination is concluded, but such order shall not be made after the day appointed for first meeting of creditors (*h*), and, if that meeting is adjourned, then not until it has been concluded (*i*).

The Official Receiver shall take part in the examination, and if specially authorised by the Board of Trade may employ a solicitor with or without counsel (*k*). If a trustee is appointed before the conclusion of the examination he may take part in it (*l*). The Court may put such questions as it may think expedient (*m*), and any creditor who has tendered a proof, or

(*c*) B.A. s. 15 (2), (3).

(*d*) B.A. s. 15 (1), (8).

(*e*) B.A. s. 15 (8). These excepted cases arise from the combined effect of B.A. s. 166; s. 43 (3) of Larceny Act, 1916; and s. 85 of Larceny Act, 1861, and may be summarised as follows:

Stealing any will, codicil, or other testamentary instrument of either a dead or of a living person or the whole or any part of any document of title to lands (Larceny Act, 1916, ss. 6 and 7 (1)).

Fraudulent conversion (*ibid.*, s. 20).

Fraudulent conversion by a trustee (*ibid.*, s. 21).

Factors fraudulently obtaining advances on the property of their principals:

Being a director or public officer or manager of a body corporate or public company, and receiving property of that body or company and keeping fraudulent accounts in relation thereto (Larceny Act, 1861, s. 82).

Being the like and publishing false statements with intent to defraud or concurring therein (*ibid.*, s. 84).

Being the like or any member of such body or company and wilful falsifying, altering, or mutilating or destroying any of the company or body's books, papers, etc. (*ibid.*, s. 83).

(*f*) *Re Bottomley* (1915), 84 L.J.K.B. 1020.

(*g*) *Re Brunner* (1887), 19 Q.B.D. 572.

(*i*) *Re Williams* (1884), 1 Mor. 16.

(*l*) B.A. s. 15 (6).

(*h*) B.A. s. 15 (9).

(*k*) B.A. s. 15 (5).

(*m*) B.A. s. 15 (7).

his representative authorised in writing, may question the debtor concerning his affairs and the causes of his failure (*n*). A solicitor representing a creditor requires this written authority, but counsel does not (*o*).

Adjournment Sine Die.—The Court may adjourn the public examination *sine die* where:—

- (1) it is of the opinion that the debtor is failing to disclose his affairs;
- (2) the debtor has failed to attend the public examination or any adjournment thereof;
- (3) the debtor has not complied with any order of the Court in relation to his accounts, conduct, dealings and property and no good cause is shown by him for such failure;

and in such case the Court may make such further or other order as it thinks fit (*p*).

Private Examination of Debtor, Witnesses, and Discovery.—There are further powers of ascertaining the true state of the debtor's affairs, besides the public examination of the debtor, for by s. 25 (1)

the Court may, on the application of the Official Receiver or trustee, at any time after a receiving order has been made against a debtor, summon before it the debtor or his wife, or any person known or suspected to have in his possession any of the estate or effects belonging to the debtor, or supposed to be indebted to the debtor, or any person whom the Court may deem capable of giving information respecting the debtor, his dealings or property, and the Court may require any such person to produce any documents in his custody or power relating to the debtor, his dealings or property.

Trustee in this subsection includes the trustee of composition or scheme of arrangement (*q*).

Although the section speaks only of such an order being made on the application of the Official Receiver or trustee, the Court has power on the application of a creditor and may even order the trustee to submit to examination (*r*). An application for such an order shall be in writing and state the grounds upon which it is made (*s*)

(*n*) B.A. s. 15 (4).

(*o*) *R. v. Greenwich County Court Registrar* (1885), 15 Q.B.D. 54.

(*p*) B.R. 195.

(*q*) B.A. s. 16 (17).

(*r*) *Ex p. Stevens, Re Whicher* (1888), 5 Mor. 173. (*s*) B.R. 74.

The examination may be on oath, either oral or by written interrogatories (*t*), and it will be noted that the Court has by this section complete power to effect the discovery and production of all documents relating to the debtor, his dealings and property.

If any person so summoned, after having been tendered a reasonable sum, refuses to come before the Court at the time appointed, or refuses to produce any such document, having no lawful impediment made known to the Court at the time of its sitting and allowed by it, the Court may, by warrant, cause him to be apprehended and brought up for examination (*u*).

If any person on examination before the Court admits that he is indebted to the debtor, the Court may, on the application of the Official Receiver or trustee, order him to pay to the Official Receiver or trustee, at such time and in such manner as to the Court seems expedient, the amount admitted, or any part thereof, either in full discharge of the whole amount in question or not, as the Court thinks fit, with or without costs of the examination (*a*).

If any person on examination before the Court admits that he has in his possession any property belonging to the debtor, the Court may, on the application of the Official Receiver or trustee, order him to deliver to the Official Receiver or trustee such property, or any part thereof, at such time, and in such manner, and on such terms, as the Court may seem just (*b*).

The Court may, if it thinks fit, order that any person who, if in England, would be liable to be brought before it under this section, shall be examined in Scotland or Ireland, or in any other place out of England (*c*).

These powers of examination and discovery continue even after the bankrupt has obtained his discharge (*d*).

The above proceedings are common to all the three courses that may be adopted after the making of a receiving order. The courses are considered separately below.

(*t*) B.A. s. 25 (3).

(*a*) B.A. s. 25 (4).

(*c*) B.A. s. 25 (6).

(*u*) B.A. s. 25 (2).

(*b*) B.A. s. 25 (5).

(*d*) *Re Coulson*, [1934] Ch. 45.

COMPOSITION OR SCHEME OF ARRANGEMENT

Every composition or scheme must be first proposed by the debtor, then accepted by the creditors, and, finally, approved by the Court. There are two kinds:

Those proposed before adjudication, and
Those proposed after.

1. Composition or Scheme without Adjudication.—

Proposal. Where a debtor intends to make a proposal for a composition or scheme of arrangement of his affairs, he shall within four days of submitting his statement of affairs, or within such extended time as the Official Receiver may fix, lodge with the Official Receiver the terms of his proposal in writing and signed by him and setting out particulars of any securities or sureties proposed (*e*)

Acceptance.—In such a case the Official Receiver holds a creditors' meeting before the public examination of the debtor is concluded, sending to each creditor before the meeting a copy of the debtor's proposal, with a report thereon. If at that meeting a majority in number and three-fourths in value of all the creditors, who have proved, resolve to accept the proposal it is deemed to have been accepted by the creditors, and if approved by the Court is binding on all creditors (*f*).

At the meeting the debtor may amend his proposal if the amendment in the Official Receiver's opinion is for the benefit of the general body of creditors. Any creditor may vote at the meeting by sending the Official Receiver in the prescribed form a letter of assent or dissent (*g*).

Approval.—After a scheme or composition has been accepted by the creditors, the debtor or the Official Receiver may apply to the Court to have it approved, and notice of the hearing of the application is given to each creditor. The application is not heard until after the conclusion of the debtor's examination (*h*), but in the case of joint debtors the Court may, on the report of the Official Receiver that it is expedient, dispense with the public examination of one of the joint debtors if he is unavoidably prevented from attending through illness or

(*e*) B.A. s. 16 (1).

(*g*) B.A. s. 16 (3).

(*f*) B.A. s. 16 (2).

(*h*) B.A. s. 16 (5), (6).

absence from the United Kingdom (i). At such hearing any creditor who has proved may oppose the application, notwithstanding that he may previously have assented to the scheme (k). The Court also hears the Official Receiver's report as to the terms of the proposal and the conduct of the debtor (l).

Refusal to Approve Compulsory.—The Court shall refuse to approve the proposal,

- (1) if it is of the opinion that the terms are not reasonable or are not calculated to benefit the general body of creditors (m);
- (2) if the proposal does not provide for the payment in priority to other debts of all priority debts (n);
- (3) if any acts are proved which if the debtor were adjudged bankrupt would require the Court either to refuse, suspend, or attach conditions to the debtor's discharge (o), unless the proposal provides reasonable security for the payment of not less than five shillings in the pound on all unsecured provable assets (p).

Reasonable security means a reasonable commercial probability that, having regard to the state of affairs placed before the creditors, the amount named will be realised (q), and, further, it must be security for payment forthwith, or within a short time, and not at some distant date (r).

The security provided need not be on the amount of debts provable at the date of the receiving order, but only on those provable at the time of the composition being approved (s). But a release of a debt in the meantime in order to reduce the amount of debts provable must not be conditional upon the composition being approved but be an unconditional release (t).

Approval Discretionary.—Except in the above three cases, where the Court must refuse its approval, the Court may either approve or refuse to approve the proposal (u). The

(i) B.A. s. 16 (7).

(k) B.A. s. 16 (6).

(l) B.A. s. 16 (8).

(m) B.A. s. 16 (9).

(n) B.A. s. 16 (19). As to priority debts see B.A. s. 33, *post*, p. 276.

(o) See *post*, p. 299.

(p) B.A. s. 16 (10).

(q) *Re Bottomley* (1893), 10 Mor. 262.

(r) *Re Paine*, [1891] W.N. 208.

(s) *Re E. A. B.*, [1902] 1 K.B. 457.

(t) *Re Pilling*, [1903] 1 K.B. 50.

(u) B.A. s. 16 (11).

proposal approved must be that which was accepted by the creditors (a). If the creditors "get nothing more under the scheme than they would have had if the matter had proceeded in bankruptcy . . . it ought not to be approved by the Court" (b).

In exercising its discretion to approve or reject a scheme the Court must have regard to the conduct of the debtor and the public interest in commercial morality on the one hand, and on the other to what is truly in the creditor's best interests. Therefore, the mere fact that the creditors' assent does not bind the Court to approve the scheme (c); nor, on the other hand, does the fact that the debtor has committed some misconduct that would require the Court to refuse, suspend, or annex conditions to his discharge compel the Court to refuse to approve the scheme (d); "the misconduct must have been such as would make it against public policy to sanction the scheme, that is, the misconduct must have been of a gross character" (e).

The Effect of an Approved Scheme.—When a scheme or composition is approved the Court shall discharge the receiving order; and the Official Receiver, upon payment of proper fees and expenses, shall put the debtor, trustee, or other person entitled under the scheme into possession of the debtor's property (f). And when approved it is binding on all creditors so far as related to any debts provable in bankruptcy due to them from the debtor (g); but it does not release any person who would not be released under an order of discharge if the debtor had been adjudged bankrupt, *e.g.* a solvent joint debtor (h), nor does it release the debtor from any liability under a judgment against him in an action for seduction or as a co-respondent in a matrimonial cause or under an affiliation order, except to such extent and under such conditions as the Court expressly orders (i).

The provisions of such a composition or scheme may be enforced by the Court on application by any person interested,

(a) *Lucas v. Martin* (1888), 37 Ch. D. 597.

(b) *Re Aylmer* (1887), 19 Q.B.D. 33.

(c) *Re Burr*, [1892] 2 Q.B. 467.

(d) *Re E. A. B.*, [1902] 1 K.B. 457.

(e) *Per VAUGHAN WILLIAMS, L.J.*, in *Re E. A. B.*, *supra*, at p. 466—

(f) B.R. 212.

(g) B.A. s. 16 (13).

(h) B.A. s. 16 (20).

(i) B.A. s. 16 (13).

and any disobedience of an order of the Court made on the application shall be deemed a contempt of Court (*k*).

Annulment of Scheme.—If default is made in payment of any instalment due in pursuance of the composition or scheme, or if it appears to the Court, on satisfactory evidence, that the composition or scheme cannot, in consequence of legal difficulties, or for sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the Court may, if it thinks fit, on application by the Official Receiver or by the trustee or by any creditor, adjudge the debtor bankrupt and annul the composition or scheme, but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done, under or in pursuance of the composition or scheme. Where a debtor is so adjudged bankrupt, any debt provable in other respects, which has been contracted before the adjudication, shall be provable in the bankruptcy (*l*).

2. Composition or Scheme after Adjudication.

Acceptance. When a debtor is adjudged bankrupt the creditors may, if they think fit, at any time after the adjudication, by a majority in number of and three-fourths in value of all the creditors who have proved, resolve to accept a proposal for a composition in satisfaction of the debts due to them under the bankruptcy, or for a scheme of arrangement of the bankrupt's affairs: and thereupon the same proceedings shall be taken and the same consequences shall ensue as in the case of a composition or scheme accepted before adjudication (*m*), and the same rules apply (*n*).

Approval Bankruptcy Annulled.—If the Court approves the composition or scheme it may make an order annulling the bankruptcy and vesting the property of the bankrupt in him or in such other person as the Court may appoint, on such terms, and subject to such conditions, if any, as the Court may declare (*o*), and in default of such vesting order the property reverts in the debtor (*p*).

(*k*) B.A. s. 16 (15). Where an order of a Court is disobeyed it is "contempt of Court," and there is jurisdiction for the judge of a Court of Record to punish such disobedience by imprisonment if he thinks fit. In cases of wilful and flagrant disobedience the defaulter may be imprisoned until he has "purged his contempt," i.e. obeyed the order.

(*l*) B.A. s. 16 (16).

(*m*) B.A. s. 21 (1).

(*n*) B.R. 220.

(*o*) B.A. s. 21 (2).

(*p*) *Flower v. Lyme Regis Corporation*, [1921] 1 K.B. 488.

Composition Annulled.—In a like manner and in like circumstances as in a composition or scheme approved before adjudication the Court may annul a composition or scheme and again adjudicate the debtor bankrupt, and in such case all debts, provable in other respects, which have been contracted before the date of such second adjudication, shall be provable in the bankruptcy (*q*).

ADJUDICATION OF BANKRUPTCY

The Application.—At the time of making a receiving order or at any time afterwards the Court may, on the debtor's own application, adjudicate him bankrupt. The application may be made orally and without notice (*r*).

Where the public examination is adjourned *sine die* and the debtor has not been previously adjudicated bankrupt, the Court may forthwith and without any notice to him adjudge him bankrupt (*s*).

In other cases where the Court has power to adjudicate the debtor bankrupt, the application can be made by either a creditor or the Official Receiver (*t*), and in the case where a composition or scheme is not accepted by the creditors it may in addition be made by any person interested (*u*); *e.g.* a proposed surety under the scheme.

Adjudication Compulsory.—Where a receiving order has been made against a debtor then the Court must adjudicate the debtor bankrupt if

- (1) the creditors at the first meeting or any adjournment thereof by ordinary resolution (*a*) resolve that the debtor shall be adjudged bankrupt; or
- (2) pass no resolution; or
- (3) if the creditors do not meet; or
- (4) if a composition or scheme is not approved in pursuance of the Act (*b*) within fourteen days after the conclusion of the examination of the debtor or such further times as the Court shall allow (*c*).

(*q*) B.A. s. 21 (3).

(*r*) B.R. 221.

(*s*) B.R. 224.

(*t*) B.R. 222; B.A. s. 14 (3).

(*u*) B.R. 223.

(*a*) An "ordinary resolution" means a resolution decided by a majority in value of the creditors present, personally, or by proxy at a meeting of creditors, and voting on the resolution (B.A. s. 167).

(*b*) See *ante*, p. 99.

(*c*) B.A. s. 18 (1).

For good cause the Court may adjourn an application for adjudication (*d*), and where the composition or scheme has not been approved the Court will only exercise its power of ordering an immediate adjudication in exceptional circumstances (*e*).

Adjudication Discretionary.—The Court *may* adjudicate him bankrupt if

- (1) he fails without reasonable excuse to duly lodge his statement of affairs (*f*);
- (2) the debtor himself applies for adjudication (*g*);
- (3) the public examination of the debtor has been adjourned *sine die* (*h*);
- (4) a quorum (*i*) of creditors do not attend the first meeting or one adjournment thereof (*k*);
- (5) the Official Receiver satisfies the Court that the debtor has absconded (*k*);
- (6) the Official Receiver satisfies the Court that the debtor does not intend to propose a composition or scheme (*k*);
- (7) a composition or scheme is not accepted by the creditors at the first meeting or at one adjournment thereof (*l*).

The Court can adjourn an application on this last ground to enable the debtor to offer a fresh scheme and can also adjudicate the debtor bankrupt against the wishes of the creditors, as it is not desirable that a debtor should occupy the peculiar status he has between receiving order and adjudication for an indefinite time (*m*).

Advertisement of Adjudication.—Notice of every order adjudging a debtor bankrupt, stating the name, address, and description of the bankrupt, the date of the adjudication, and the Court by which the adjudication is made, shall be gazetted and advertised in a local paper in the prescribed manner, and the date of the order shall, for the purposes of the Act, be the date of the adjudication (*n*).

(*d*) *Re Thurlow*, [1895] 1 Q.B. 724. (*e*) *Re Flew*, [1905] 1 K.B. 278.

(*f*) B.A. s. 14 (3).

(*g*) B.R. 221.

(*h*) B.R. 224.

(*i*) A quorum consists of at least three creditors, or if there are less than three, all the creditors (B.A. Sched. I, r. 24).

(*k*) B.R. 222.

(*l*) B.R. 223.

(*m*) *Re A Debtor* (1910), 130 L.T.Jo. 176, C.A. (*n*) B.A. s. 18 (2).

Effect of Adjudication.—Upon adjudication the property (o) of the bankrupt becomes divisible amongst his creditors and vests in a trustee (p). Until a trustee is appointed the Official Receiver is the trustee, and the vesting is immediate and automatic upon the making of the order (q).

The adjudication also disqualifies him from

- (1) sitting or voting in the House of Lords, or on any committee thereof, or being elected as a peer of Scotland or Ireland to sit and vote in the House of Lords;
- (2) being elected to or sitting or voting in the House of Commons, or on any committee thereof;
- (3) being appointed or acting as a justice of the peace;
- (4) being elected to or holding or exercising the office of mayor, alderman, or councillor;
- (5) being elected to or holding or exercising the office of guardian of the poor, overseer of the poor, member of a sanitary authority, or member of a school board, highway board, burial board, or select vestry,

until such time as

- (1) the adjudication is annulled; or
- (2) he obtains his discharge, with a certificate that his bankruptcy was caused by misfortune without any misconduct on his part (r).

He is also liable to criminal prosecution if before his discharge he

- (a) either alone or jointly with any other person obtains credit to the extent of £10 or upwards from any person without informing that person that he is an undischarged bankrupt; or
- (b) engages in any trade or business under a name other than that under which he was adjudicated bankrupt without disclosing to all persons with whom he enters into any business transaction the name under which he was adjudicated bankrupt (s).

(o) As to what constitutes his property, see Chaps. 6, 7, and 8.

(p) B.A. s. 18 (1).

(q) B.A. s. 53 (1).

(r) B.A., 1883, s. 32.

(s) B.A. s. 155 (a), (b).

- (c) without leave of the Court by which he was adjudicated bankrupt, acts as director of, or directly or indirectly takes part in or is concerned in the management of, any company. But this does not apply to an undischarged bankrupt who on the 3rd of August, 1928, was so acting and continuously so acted since that date and his bankruptcy was prior to that date (*t*).

If a banker finds that an undischarged bankrupt has an account with him, then, unless he is satisfied that the account is on behalf of some other person, it is his duty to inform the trustee in bankruptcy or the Board of Trade forthwith of the existence of the account, and thereafter he must not make any payments out of the account, except under an order of the Court or in accordance with instructions of the trustee, unless by the expiration of one month from the date of giving the information no instructions have been received from the trustee (*u*).

Annulment of an Adjudication.—By statute there are three cases in which an adjudication can be annulled. They are:

- (1) Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt (*a*).
- (2) Where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full (*a*).

A debt due to a creditor who cannot be found or identified is considered paid in full if paid into Court, and so, too, is a debt which is disputed by the debtor if he enters into a bond for such sum and with such sureties, as the Court approves, for the payment of such sum with costs as may be recovered in any proceedings for its recovery (*b*). But subject to this all debts actually and properly proved must be paid in full in cash; an unconditional release is not equivalent to payment (*c*).

Where an adjudication is annulled under either of the above cases all sales and dispositions of property and payments duly made, and all acts theretofore done by the Official Receiver, trustee, or other person acting under their authority, or by

(*t*) Companies Act, 1929, s. 142.

(*a*) B.A. s. 29 (1).

(*c*) *Re Keet*, [1905] 2 K.B. 666.

(*u*) B.A. s. 47 (2).

(*b*) B.A. s. 29 (4).

the Court, shall be valid, but the property of the debtor, who was adjudged bankrupt, shall vest in such person as the Court may appoint, or, in default of any such appointment, revert to the debtor for all his estate or interest therein on such terms and subject to such conditions, if any, as the Court may declare by order (*d*).

- (3) Where a composition after adjudication is approved by the Court (*e*).

Besides the above three cases there would appear to be an inherent jurisdiction in the Court to annul an adjudication where the proceedings were an abuse of process of the Court (*f*). The question, however, is not free from doubt, as cases of abuse of process do not seem to have arisen except in *Re Betts* (*g*), the validity of which seems doubtful in view of the decision in *Re Hancock* (*h*).

(*d*) B.A. s. 29 (2).

(*f*) *Re Painter*, [1895] 1 Q.B. 85.

(*h*) [1904] 1 K.B. 585.

(*e*) B.A. s. 21 (2). And see *ante*, p. 101.

(*g*) [1901] 2 K.B. 39.

CHAPTER 5

THE APPOINTMENT, POWERS AND DUTIES OF TRUSTEES AND COMMITTEES OF INSPECTION

FROM the making of a receiving order until adjudication, if no scheme or composition is effected, the debtor's property remains vested in him, subject to its being in the possession of the Official Receiver and controlled by him, but one of the effects of adjudication is to vest that property in a trustee for division amongst the creditors. The trustee may perform this duty either

- (i) alone; or
- (ii) with a committee of inspection.

COMMITTEES OF INSPECTION

Appointment.—The creditors qualified to vote may, at the first or any subsequent meeting by ordinary resolution, appoint a committee of inspection for the purpose of superintending the administration of the bankrupt's property by the trustee (a).

Number and Qualification of Members.—The committee shall consist of not more than five nor less than three persons, possessing one or other of the following qualifications:

- (a) That of being a creditor or the holder of a general proxy or general power of attorney from a creditor, provided that no creditor and no holder of a general proxy or general power of attorney from a creditor shall be qualified to act as a member of the committee of inspection until the creditor has proved his debt and the proof has been admitted; or
- (b) That of being a person to whom a creditor intends to give a general proxy or general power of attorney; provided that no such person shall be qualified to act as a member of the committee of inspection until he holds such a proxy or power of attorney; and until the creditor has proved his debt and the proof has been admitted (b).

(a) B.A. s. 20 (1).

(b) B.A. s. 20 (2).

Powers of Committee of Inspection.—The committee of inspection, provided it does not consist of less than three members (c), may give permission for the trustee to do all or any of the following things (cc):

- (1) Carry on the business of the bankrupt, so far as may be necessary for the beneficial winding-up of the same;
- (2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt;
- (3) Employ a solicitor or agent to take any proceedings or to do any business which may be sanctioned by the committee of inspection;
- (4) Accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time subject to such stipulations as to security and otherwise as the committee think fit;
- (5) Mortgage or pledge any part of the property of the bankrupt for the purpose of raising money for the payment of his debts;
- (6) Refer any dispute to arbitration, compromise any debts, claims and liabilities, whether present or future, certain or contingent, liquidated or unliquidated, subsisting or supposed to subsist between the bankrupt and any person who may have incurred any liability to the bankrupt, on the receipt of such sums, payable at such times, and generally on such terms as may be agreed on;
- (7) Make such compromise or other arrangement as may be thought expedient with creditors, or persons claiming to be creditors, in respect of any debts provable under the bankruptcy;
- (8) Make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt, made or capable of being made on the trustee by any person or by the trustee on any person;
- (9) Divide in its existing form amongst the creditors, according to its estimated value, any property which, from its peculiar nature or other special circumstances, cannot be readily or advantageously sold;

- (10) Appoint the bankrupt himself to superintend the management of the property of the bankrupt or of any part thereof, or to carry on the trade (if any) of the bankrupt for the benefit of his creditors, and in any other respect to aid in administering the property, in such manner and on such terms as the trustee may direct;
- (11) From time to time make such allowance as he thinks just to the bankrupt out of his property for his support and that of his family, or in consideration of his services if he is engaged in winding-up his estate, but such allowance may be reduced by the Court.

The permission given for (1) to (9) must not be a general permission, but shall only be a permission to do the particular things for which permission is sought in the specified case or cases (*d*).

Of the above eleven things that the committee may authorise the trustee to do, (1), (2), (3), (10) and (11) are dealt with in the chapter on the management of the bankrupt's property.

Any sanction to compromise given by the committee under (6), (7) or (8) may be overruled by the general body of creditors (*e*). In a decision under the Act of 1869 (*f*) it was held that the compromise of an action by a trustee without the sanction of the committee was valid and binding: that Act required the committee's sanction for the trustee to do any of the things in (6), (7), or (8) above, but such sanction was not required to institute or defend an action.

It is submitted that this is still the position when a trustee is validly (*i.e.* with the committee's authority) prosecuting or defending an action.

- (12) If satisfied that there is sufficient reason they may permit the trustee to postpone the first dividend to a date later than four months after the first meeting of creditors (s. 62 (2)).
- (13) If the creditors so resolve by ordinary resolution, the committee of inspection can fix the trustee's remuneration where he is appointed by the creditors (s. 82 (1)) (*g*).
- (14) If it appears to the committee of inspection that, for the purpose of carrying on the debtor's business or of obtaining advances, or because of the probable amount

(*d*) B.A. ss. 56, 57 and 58.

(*e*) *Re Ridgway* (1889), 6 Mor. 277, 579.

(*f*) *Leeming v. Lady Murray* (1879), 13 Ch. D. 123.

(*g*) For form of remuneration see pp. 123, 124 *post*.

of the cash balance, or if the committee shall satisfy the Board of Trade that for any other reason it is for the advantage of the creditors that the trustee should have an account with a local bank, the Board of Trade shall, on the application of the committee of inspection, authorise the trustee to make his payments into and out of such local bank as the committee may select (s. 82 (2)).

- (15) They may give directions in the administration and distribution of the bankrupt's property, but these may be overruled by, and must not conflict with, the directions given by an ordinary resolution of the general body of creditors at any general meeting (s. 79 (1)).

If there be no committee of inspection, any act or thing or any direction or permission by this Act authorised or required to be done or given by the committee may be done or given by the Board of Trade on the application of the trustee (s. 20 (10)).

Duties.—Besides the duty of exercising the above special powers when occasion arises and the general power of giving directions to the trustee (power (15) above), the committee is under the following specific duties:

- (1) The committee of inspection shall meet at such times as they shall from time to time appoint, and, failing such appointment, at least once a month: and the trustee or any member of the committee may also call a meeting of the committee as and when he thinks necessary (s. 20 (3)).

The committee may act by a majority of their members present at the meeting, but shall not act unless a majority of the committee are present at the meeting (*h*).

- (2) The trustee shall submit the record book and cash book, together with any other requisite books and vouchers, to the committee of inspection (if any) when required, and not less than once every three months (*i*).
- (3) The committee of inspection shall, not less than once every three months, audit the cash book and certify therein under their hands the day on which the said book was audited (*j*).

(*h*) B.A. s. 20 (4).

(*i*) B.R. 362.

(*j*) B.R. 363.

- (4) Neither the trustee nor any member of the committee of inspection of an estate shall, while acting as trustee or member of such committee, except by leave of the Court, either directly or indirectly, by himself or any partner, clerk, agent, or servant, become purchaser of any part of the estate. Any such purchase made contrary to the provisions of this rule may be set aside by the Court on the application of the Board of Trade or any creditor (*k*).
- (5) No member of a committee of inspection of an estate shall, except under and with the sanction of the Court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services rendered by him in connection with the administration of the estate, or for any goods supplied by him to the trustee for or on account of the estate. If it appears to the Board of Trade that any profit or payment has been made contrary to the provisions of this rule they may disallow such payment or recover such profit, as the case may be, on the audit of the trustee's account.

Where the sanction of the Court under this rule to a payment to a member of the committee of inspection for services rendered by him in connection with the administration of the estate is obtained, the order of the Court shall specify the nature of the services, and shall only be given where the service performed is of a special nature. No payment shall, under any circumstances, be allowed to a member of a committee for services rendered by him in the discharge of the duties attaching to his office as a member of such committee (*l*).

Cessation of Membership.—Any member of the committee may resign his office by notice in writing signed by him and delivered to the trustee (*m*).

If a member of the committee becomes bankrupt, or compounds or arranges with his creditors, or is absent from five consecutive meetings of the committee, his office shall thereupon be

(*k*) B.R. 347.

(*m*) B.A. 348 (2).

(*l*) B.R. 348 (2) and

(*n*) B.A. 348 (2).

Any member of the committee may be removed by an ordinary resolution of any meeting of creditors of which seven days' notice has been given stating the object of the meeting (*o*).

On a vacancy occurring in the office of a member of the committee, the trustee shall forthwith summon a meeting of the creditors for the purpose of filling the vacancy, and the meeting may by resolution appoint another creditor or other person eligible as above to fill the vacancy (*p*).

The continuing members of the committee, provided there are not less than two such continuing members, may act notwithstanding any vacancy in their body: and, where the number of members of the committee of inspection is for the time being not less than five, the creditors may increase that number so that it does not exceed five (*q*).

TRUSTEES IN BANKRUPTCY

First Appointment.—The trustee in bankruptcy may be appointed by

- (1) the creditors; or
- (2) the committee of inspection; or
- (3) the Board of Trade.

(1) *By the Creditors.*—When the debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may by ordinary resolution (*r*) appoint one or more (*s*) fit persons to be trustee or trustees in bankruptcy (*t*). They may also appoint a trustee in bankruptcy where the Board of Trade has appointed a trustee under s. 19 (6) (*vide infra*); the person appointed by the creditors will, on the appointment being made and certified, become trustee in place of the person appointed by the Board of Trade (*u*).

(2) *By the Committee of Inspection (a).*—Instead of appointing a trustee themselves, the creditors may resolve to leave his

(*o*) B.A. s. 20 (7).

(*q*) B.A. s. 20 (9).

(*r*) B.A. s. 77 (1).

(*u*) B.A. s. 19 (7).

(*p*) B.A. s. 20 (8).

(*r*) Defined, B.A. s. 167 (*ante*, p. 93).

(*t*) B.A. s. 19 (1).

(*a*) *Vide* B.A. s. 20.

appointment to the committee of inspection (b). With like authority the committee of inspection may also appoint a trustee in substitution for a trustee appointed by the Board of Trade (c).

(3) *By the Board of Trade.*—If a trustee is not appointed by the creditors within four weeks from the date of the adjudication, or in the event of there being negotiations for a composition or scheme pending at the expiration of those four weeks, then within seven days from the close of those negotiations, the Official Receiver must report the matter to the Board of Trade, and thereupon the Board of Trade will appoint a trustee and certify the appointment (d).

Appointment on a Vacancy.—On a vacancy in the office of trustee the creditors may in general meeting appoint a new trustee. The same proceedings must be taken as in the case of a first appointment (e).

Any creditor may require the Official Receiver to summon a meeting for the purpose (f).

If the creditors do not appoint within three weeks after the occurrence of the vacancy, the Official Receiver must report to the Board of Trade and the Board will then appoint: but in such case the creditors or committee of inspection may appoint a trustee in place of the person appointed by the Board of Trade as they might do in the case of a first appointment, and thereupon the person appointed by the Board of Trade will cease to be trustee (g).

Although section 78 does not expressly authorise the committee of inspection to appoint a new trustee, except in place of a trustee appointed by the Board of Trade, it is submitted that the committee of inspection has this power if the appointment of the first trustee has, by virtue of a resolution of the creditors, been left to it.

Proceedings on Appointment.—The person appointed is required to give security to the satisfaction of the Board of Trade, and the Board, if satisfied with the security, certifies that his appointment has been duly made (h).

(b) B.A. s. 19 (1).

(d) B.A. s. 19 (6).

(f) B.A. s. 78 (2).

(h) B.A. s. 19 (2).

(c) B.A. s. 19⁷(7).

(e) B.A. s. 78 (1).

(g) B.A. s. 78 (3) and s. 19 (7), *supra*.

The appointment only takes effect from the date of the certificate of the Board of Trade (*i*).

Notice of the appointment is inserted by the Board of Trade in the *London Gazette* and the trustee must insert notice in a local paper (*k*).

The certificate is conclusive evidence of the appointment (*l*), and no defect or irregularity in his appointment shall vitiate any act done by a trustee in good faith (*m*).

It was laid down by the Court of Appeal (JAMES, BRETT, and COLLINS, L.JJ.) in *Ex parte Kimber* (*n*), that the choice of a trustee ought not to be disturbed unless there are some very special circumstances, such as fraud in procuring the rejection of the proof of a debt. In this case only two creditors attended the meeting. One was a solicitor who had not delivered a bill of costs, and the registrar decided that he could not vote on the choice of a trustee. The other creditor therefore appointed a trustee, and the appointment was upheld by the Court of Appeal.

Qualifications of a Trustee.

(1) He must be a "fit person." He will not be deemed to be fit if he has been previously removed under s. 95 (2) from the office of trustee of a bankrupt's property for misconduct or neglect of duty (*o*), but not apparently if he has been removed on any other ground specified in s. 95 (2). It is, however, a sufficient ground for refusing to certify the appointment of a person as trustee that in any other proceeding under the Act such person has either been removed under s. 95 (2) on any ground therein mentioned, or has failed or neglected without good cause to render accounts for audit for two months after such accounts should have been rendered (*p*). In the case of *In re Rothman and Allanswick* (*q*) a removal by the Board of Trade was upheld by the Court although the effect of removal is to debar a trustee forever from holding the office of trustee in bankruptcy.

(2) He may or may not be a creditor.

(3) He must not be the Official Receiver, who only acts as trustee in any of the following circumstances:

(*i*) B.A. s. 19 (4).

(*k*) B.R. 327.

(*m*) B.A. s. 147 (2).

(*o*) B.A. s. 19 (1). Cf. *In Re Rothman and Allanswick*, [1934-35] B. & C.R. 224.

(*p*) B.R. 330.

(*l*) B.A. s. 143.

(*n*) (1879), 11 Ch. D. 869.

(*q*) [1934-35] B. & C.R. 224.

- (a) Until a trustee is appointed (a);
- (b) During a vacancy in the office (b);
- (c) In small bankruptcies, that is, where the property of the bankrupt is not likely to exceed £300 in value and the Court orders that the debtor's estate be administered in a summary manner (c);
- (d) In the administration of the estates of deceased insolvents, if the creditors do not appoint a trustee (d).

Objection by Board of Trade.—The Board of Trade may object to the appointment of a trustee on any of the following grounds (e):

- (1) That the appointment was not made in good faith by a majority in value of the creditors voting.
- (2) That the person appointed is not fit (f) to act as trustee.
- (3) That the proposed trustee's "connection with or relation to the bankrupt or his estate or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally."
- (4) That the proposed trustee is a person who has failed to deal with funds or dividends as provided by s. 153 of the Bankruptcy Act (g), or has not complied with any order of the Board made under that section (h).

If the Board objects to the appointment, a majority in value of the creditors may request them to notify the objection to the High Court, and thereupon the High Court may decide upon its validity (i).

At the hearing the person objected to, and every creditor and the Board of Trade, will be entitled to be heard (k).

The Board may transmit to the Court the grounds of its objections, and such communication will be *prima facie* evidence of the statements contained in it (l).

It should be noticed that in the case of *In re Mardon* (m) it was held by VAUGHAN WILLIAMS, J., applying the decision of the Court of Appeal in *In re Lamb* (n), that the Court has only to

(a) B.A. s. 53.
 (b) B.A. ss. 74 (1) (g), 78 (4).
 (c) B.A. s. 129 (1). *Vide post*, p. 321.
 (d) B.A. s. 130 (4). *Vide post*, p. 322.
 (e) B.A. s. 19 (2).
 (f) *Vide ante*, p. 114.
 (g) *Vide post*, p. 130.
 (h) B.R. 329.
 (i) B.A. s. 19 (3).
 (k) B.R. 328 (1).
 (l) B.R. 328 (2).
 (m) [1896] 1 Q.B. 140.
 (n) [1894] 2 Q.B. 805.

decide whether the objection of the Board is valid in point of law and has not to exercise any discretion on the merits of the case. The Board had objected on the ground that the proposed trustee was one of two trustees under a deed of arrangement executed by the bankrupt and, as trustee in bankruptcy, would have to investigate his account as trustee under the deed.

The Court held that the Board's objection was valid "because the trustee, as trustee under the deed, will have to account to himself as trustee in bankruptcy, and this makes it difficult for him to act with impartiality": *per* VAUGHAN WILLIAMS, J. (o).

Impartiality of Trustee.—As examples of the class of objections by the Board of Trade on ground (3), two cases may be cited: the Court in one case held the objection invalid, and in the other upheld the objection. In *Ex p. Board of Trade* (p), which was the first case under the similar section of the Bankruptcy Act, 1883, the debtor was a solicitor. His brother, also a solicitor, was one of the largest creditors. After abortive suggestions for a composition, the creditors resolved that the debtor should be adjudged bankrupt and that one Jones should be trustee. The Board of Trade objected to Jones on ground (3), basing their objection principally on the facts that Jones was alleged to be the nominee of the debtor's brother, that the latter and Jones voted against the appointment of a committee of inspection, and that a majority in number, though not in value, of the creditors were opposed to Jones' appointment.

It was held by CAVE, J., that the objection was invalid on the ground that opposition by a minority in value of the creditors was an insufficient ground. As CAVE, J., said (at p. 226):

"Now . . . I cannot think that because a large creditor proposes a particular trustee, that on that ground alone there should any suspicion attach to his appointment. . . . I think 'if the Board of Trade . . . had not been induced to suppose that Evan Jones was the nominee of the debtor's brother, the Board of Trade would have come to a different conclusion in this case.'"

In *In re Martin* (q) the debtor had executed a deed of assignment under which one Jenkins was the trustee. One creditor petitioned on this deed, the debtor was adjudged bankrupt, and Jenkins was appointed trustee in bankruptcy.

(o) *At* p. 145.

(q) (1888), 5 Mor. 129.

(p) (1884), 1 Mor. 216.

The Board of Trade objected on ground (3) because Jenkins had retained £10 1s. 8d. which he had received under the deed. He had paid £10 to the debtor's solicitors, at the debtor's request, when they were instructed to oppose the bankruptcy petition, and the 1s. 8d. represented expenses incurred by Jenkins. The Board's objection was held to be valid. CAVE, J., said (at p. 139):

"Has he (Jenkins) made it difficult to act with impartiality? "To my mind he has clearly done so, because he has put "himself in the position in which he will have to decide between "his own interests and the claims of the creditors" (*i.e.* whether the £10 1s. 8d. was properly retained). "It is no answer to "say that machinery exists by which, if he goes wrong, he may "be forced back into the right road. The object of the statute "is to avoid any such mischief in the outset, and to enable the "Board of Trade to object to the appointment where the "circumstances make it difficult for him to act with impartiality."

Number of Trustees.—The creditors (and, *semble*, the committee of inspection, if the appointment of a trustee has been left to them) may appoint one or more persons to the office of trustee and, when more persons than one are appointed, the creditors must declare whether any act to be done by the trustee is to be done by all or any one or more of such persons (r). All such persons, however, are included under the term "trustee" and will be joint tenants of the bankrupt's property (s).

The creditors may also appoint persons to act as trustees in succession in the event of one or more of the persons first named declining to accept the office, or failing to give security or failing to have his appointment certified by the Board of Trade (t).

Vacation of Office by Trustee.

(1) *On Completion of the Bankruptcy Proceedings.*—When the trustee has realised all the property, or so much thereof as can, in his opinion, be realised without needlessly protracting the trusteeship, and has distributed a final dividend (if any), or has ceased to act by reason of a composition having been approved, the Board of Trade may, on his application, grant a release, and such release operates as a removal of him from his office, and thereupon the Official Receiver shall be the trustee (u).

(r) B.A. s. 77 (1).

(s) *ibid.*

(t) B.A. s. 77 (2).

(u) B.A. s. 93 (1) and (5); *vide post*, p. 125.

(2) *On Insolvency*.—If a receiving order is made against a trustee in bankruptcy he thereby vacates his office of trustee (*v*).

(3) *Removal by the Creditors*.—The creditors may, by ordinary resolution (*w*), at a meeting specially called for that purpose, of which seven days' notice has been given, remove a trustee appointed by them, and may at the same or any subsequent meeting, appoint another person to fill the vacancy (*x*).

In counting the votes, the vote of the trustee, or of his partner, clerk, solicitor, or solicitor's clerk, either as creditor or as proxy, must not be reckoned in the majority (*y*).

The meeting may be summoned at the desire of one-sixth in value of the creditors, and may be summoned by a member of the committee of inspection, or by the Official Receiver on the deposit of a sum sufficient to defray the expenses of summoning the meeting (*z*).

(4) *Removal of a Trustee appointed by the Board of Trade*.—A trustee appointed by the Board of Trade in default of appointment by the creditors or committee of inspection will cease to be trustee when the Board has certified the appointment, by the creditors or the committee of inspection, of another person in his place (*a*).

(5) *Removal by the Board of Trade*.—The Board may remove a trustee in bankruptcy from his office on any one of the following grounds:

- (a) if he fails to keep up the security which has been given in the prescribed manner (*b*);
- (b) if he fails to increase the security when called upon to do so (*b*);
- (c) if he has been removed from office in any other matter on the ground of misconduct; this appears to mean where he has been removed from the office of trustee in some other bankruptcy (*c*);
- (d) if for more than ten days he has retained a sum exceeding £50, or such other amount as the Board of Trade in any particular case authorise him to retain, and fails to explain the retention to the satisfaction of the Board (*d*); in this

(v) B.A. s. 94.

(x) B.A. s. 95 (1).

(z) B.R. 341.

(b) B.R. 331.

(d) B.A. s. 89 (5).

(w) Defined, B.A. s. 167 (*ante*, p. 93).

(y) B.A. Sched. I, r. 28.

(a) B.A. ss. 19 (7), 78 (3).

(c) B.A. s. 95 (2).

case the trustee is liable to pay interest on the amount so retained in excess of £50 at the rate of 20 per centum per annum, has no claim for remuneration and is liable to pay any expenses occasioned by reason of his default (d);

- (e) if the Board of Trade are of opinion (e) that any one of the following facts exists:

(1) That a trustee appointed by the creditors is guilty of misconduct, or fails to perform his duties under the Bankruptcy Act.

Thus, in *Re Morgan* (f) the trustee, not from any dishonest motive, but through inadvertence, paid £350 (the proceeds of sale of property) into his own account instead of paying it into the Bankruptcy Estates Account within one week of receiving it as required by s. 74 (3) of the Bankruptcy Act, 1883 (now Bankruptcy Act, s. 89 (2) and (5)). He subsequently paid it into the Bankruptcy Estates Account, but, so as to screen himself, he rendered accounts to the Board of Trade showing false dates and obtained a letter from the auctioneer who sold the property purporting to explain the delay. The Board removed the trustee, and, on the creditors unanimously disapproving of the removal, the trustee appealed to the High Court. It was held that the Board acted properly in the circumstances, and VAUGHAN WILLIAMS, J., said:

"The mere non-payment into the Bankruptcy Estates Account does not affect me. What does press me is his using his official position to screen himself, and inducing another official to do wrong to screen him. . . . It seems to me, that under those circumstances, it is perfectly impossible to advise the Board of Trade that they exercised, in my judgment, any wrong discretion in ordering the removal of this trustee. . . . I do not see how the Board of Trade could avoid removing a gentleman from his trusteeship who has in the course of that trusteeship admittedly been guilty of deliberate falsehood, and also had induced someone else to fabricate a false letter in support of that falsehood. . . . When a person in an official position like the trustee here departs from his duty in order to screen his own misconduct, and induces his subordinate, the auctioneer, to join him in such conduct, it is impossible to treat that as other than a gross case of misconduct" (g).

(e) B.A. s. 95 (2).

(f) (1895), 2 Mans 526.

(g) Cf. *In Re Rothman and Allanswick*, [1934-35] B. & C.R. 224, *supra* p. 114.

(2) That the trusteeship is needlessly protracted without any probable advantage to the creditors.

(3) That the trustee is by reason of lunacy, or continued sickness or absence, incapable of performing his duties.

(4) That the trustee's connection with or relation to the bankrupt, or his estate, or any particular creditor, might make it difficult for him to act with impartiality in the interest of the creditors generally.

In any of these four cases, and also when the trustee has been removed by the Board of Trade on ground (c), if the creditors by ordinary resolution disapprove of the trustee's removal, he or they may appeal against it to the High Court (*h*). The appeal must be brought within twenty-one days from the date of the decision of the Board of Trade removing the trustee (*i*).

It would appear that the provisions of Bankruptcy Rule 341 (*k*) with reference to summoning a meeting of the creditors would also apply in this case.

Where a trustee is removed by the Board of Trade the order removing him must at once be transmitted by the Board to the registrar of the Court, who must file the notice with the proceedings and give notice thereof to the Official Receiver. The Board must also cause the notice to be gazetted (*l*).

It should be observed that where the Board is of opinion that any act done by a trustee or any resolution passed by a committee of inspection should be brought to the notice of the creditors, for the purpose of being reviewed or otherwise, the Official Receiver may summon a meeting of creditors to consider the same, and the expense of summoning such meeting must be paid by the trustee out of any available assets under his control (*m*).

(6) *On Resignation by the Trustee (n).*

Powers of the Trustee in Bankruptcy.—In addition to his powers connected with the management of the bankrupt's property (*o*), the trustee in bankruptcy has the following general powers:

(*h*) B A. s. 95 (2).

(*k*) Referred to *ante*, p. 118.

(*m*) B R 350.

(*n*) B.A. s. 93 (1) and B.R. 333; *vide post*, p. 124.

(*o*) *Vide post*, Chap. 9.

(*i*) B.A. s. 108 (3).

(*l*) B.R. 332.

- (1) To use his official name, which is "the trustee of the property of a bankrupt," and by that name to "hold property of every description, make contracts, sue and be sued (*p*), enter into any engagements binding on himself and his successors in office, and do all other acts necessary or expedient to be done in the execution of his office" (*q*).
- (2) From time to time to "summon general meetings of the creditors for the purpose of ascertaining their wishes" (*r*).
- (3) To apply to the Court "for directions in relation to any particular matter arising under the bankruptcy" (*s*).

Where the creditors have, by resolution, given the trustee directions, the Court has power, for just cause, to order the trustee to disregard the creditors' directions.

In *Ex p. Cocks* (*t*) the trustee in bankruptcy realised the assets and paid one dividend of 2s. in the £. He then suspected that some payments made by the debtors before filing their petition to two members of their family and to one Holder had been made by way of fraudulent preferences. He was legally advised that proceedings for recovery of this money would probably be successful, and witnesses were summoned under s. 96 of the Bankruptcy Act, 1869 (*u*). He also suspected that the goodwill of the debtors' business had been transferred to a clerk formerly in their employment, and that this clerk was carrying on the business under some collusive arrangements with the debtors for their benefit. A general meeting of the creditors was held, and resolutions were passed directing the trustee to take no further steps in the examination of witnesses or commence litigation. A number of creditors who voted in favour of these resolutions had only proved for very small sums, and one of the two dissentient creditors was a creditor for £4,960. As the accounts then stood there would probably only be a further dividend of 2d. in the £. The trustee applied to the Court for directions.

It was held by the Court of Appeal (JESSEL, M.R., BRETT, and COTTON, L.JJ.) that the directions of the creditors contained in their resolutions should be disregarded by the trustee COTTON, L.J., said (at p. 406):

(*p*) Cf. *ante*, p. 108.

(*r*) B.A. s. 79 (2) and Sched. I, § 5. *Vide ante*, p. 92.

(*s*) B.A. s. 79 (3) and B.R. 344.

(*u*) Now B.A. s. 25 (1) and (2).

(*q*) B.A. s. 76.

(*t*) (1882), 21 Ch. D. 397.

"The exercise of the powers which are given by the Act
 "to the majority of the creditors ought to be most carefully
 "watched, for we cannot help seeing that attempts are often
 "made to use these powers for purposes for which they were
 "not given. As Lord Justice JAMES said in *Ex p. Page* (a),
 "'Legislature has given great power to the majority, but it
 "'must be exercised *bona fide* in the interest of the creditors,
 "'and not from motives of kindness to the debtor. There must
 "'be a *bona fide* resolution of the creditors dealing as creditors.'
 "In other words, the power must be exercised with a view to
 "the administration of the estate in such a way as to provide
 "the best possible dividend for all the creditors. In the present
 "case it appears to me that the resolution was passed, not for
 "that purpose, but for some indirect object. . . ."

But in *In re Ridgway, Ex p. Hurlbatt* (b), the Court refused to overrule the resolution of the creditors.

In this case there was a very complicated claim, and the trustee came to the conclusion that a compromise should be effected in order to avoid litigation. The terms were arranged and submitted to the committee of inspection, who approved them, notwithstanding a strong objection by two members. But at a subsequent meeting of the creditors, a resolution rejecting the compromise was passed. The trustee applied to the Court for leave to carry out the compromise notwithstanding this resolution of the creditors.

It was held by CAVE, J., that the resolution of the creditors ought not to be overruled. CAVE, J., said (at p. 280):

"In this case it is admitted that no improper motive can be
 "imputed to these creditors who have refused the compromise,
 "but it is said that I ought to overrule their decision on the
 "ground that the compromise is so manifestly beneficial to the
 "estate that the wishes of the majority ought to give way to
 "the wishes of the minority. If I should come to that con-
 "clusion, I should really be coming to the conclusion that the
 "creditors had not acted *bona fide* when in fact it is admitted
 "that they did so act. . . . I do not say that in a case where it
 "could be shown that the decision was clearly wrong, and also
 "it is difficult to see how any such decision could possibly have
 "been arrived at if everything was *bona fide*, the Court would
 "not interfere. But the resolution here is clearly not that."

- (4) To obtain possession of all property of the bankrupt of which the Official Receiver may be possessed (c), and to

(a) (1871), 25 L.T. 716.

(b) (1889), 6 Mor. 277.

(c) B.R. 349 (1).

require from the Official Receiver "all such information respecting the bankrupt and his estate and affairs as may be necessary or conducive to the due discharge of the duties of the trustee" (d).

Before the estate is handed over to him the trustee must have discharged any balance due to the Official Receiver on account of fees, costs, and charges properly incurred by him, and on account of all advances properly made by him in respect of the estate with interest on such advances at £4 per cent. per annum, and must also have discharged or undertaken to discharge all guarantees properly given by the Official Receiver for the benefit of the estate. The Official Receiver is deemed to have a lien on the estate until such balance has been paid and such guarantees and other liabilities have been discharged (e).

- (5) To "examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it" (f). This power may also be regarded as a duty (g).
- (6) To "exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of the bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice" (h).
- (7) Subject to the provisions of the Bankruptcy Act, to "use his own discretion in the management of the estate and its distribution among the creditors" (i).
- (8) To be remunerated in respect of his services as trustee.

In the case of a trustee appointed by the creditors (or, *semble*, by the committee of inspection) his remuneration (if any) shall be fixed by an ordinary resolution of the creditors. or, if the creditors so resolve, by the committee of inspection, and shall be in the nature of a commission or percentage, of which one part shall be payable on the amount realised by the trustee, after deducting any sums paid to secured creditors out of the proceeds of their securities, and the other part on the amount distributed in dividend (k).

(d) B.R. 349 (3).

(e) B.R. 349 (1) and (2).

(g) *Vide post*, p. 130.

(i) B.A. s. 79 (4).

(f) B.A., Sched. II, § 23. *Vide post*, p. 130.

(h) B.A. s. 38 (2) (b).

(k) B.A. s. 82 (1) and B.R. 334.

Except as provided by the Act or Rules, no trustee may receive out of the estate any remuneration for services rendered to the estate, except the remuneration to which under the Act and Rules he is entitled as trustee (*l*).

If the Board of Trade appoints a trustee he "shall receive out of the estate such remuneration as the Board of Trade shall determine" (*m*).

The Board of Trade shall also fix the remuneration "if one-fourth in *number or value* of the creditors dissent from the resolution" of the creditors fixing the trustee's remuneration, or if "the bankrupt satisfies the Board of Trade that the remuneration is unnecessarily large" (*n*).

The resolution fixing the remuneration "shall express what expenses the remuneration is to cover," and, in respect of such expenses, "no liability shall attach to the bankrupt's estate, or to the creditors" (*o*).

No payment shall be allowed in the trustee's accounts "in respect of the performance by any other person of the ordinary duties which are required by statute or rules to be performed by himself" (*p*). If the trustee is a solicitor "he may contract that the remuneration for his services as trustee shall include all professional services" (*q*).

Where other persons are properly employed by the trustee, their bills and charges shall be taxed (*i.e.* subjected to a review by an officer of the Court called a taxing master), and the taxing master must satisfy himself that their employment has been duly sanctioned, and if any such person fails within seven days, or such further time as the Court may grant, after receipt of a request by the trustee to deliver his bill of costs or charges, the trustee may declare and distribute a dividend and thereupon the claim of any such person will be forfeited (*r*).

(*g*) To be allowed out of the bankrupt's estate, if the trustee acts without remuneration, "such proper expenses incurred by him in or about the proceedings of the bankruptcy as the creditors may, with the sanction of the Board of Trade, approve" (*s*).

(*10*) To resign from his trusteeship (*t*).

(*l*) B.R. 335.

(*n*) B.A. s. 82 (2).

(*p*) B.A. s. 83 (1).

(*r*) B.A. s. 83 (3) and (4).

(*t*) B.A. s. 93.

(*m*) B.R. 336.

(*o*) B.A. s. 82 (3).

(*q*) B.A. s. 83 (2).

(*s*) B.A. s. 82 (4).

A trustee intending to resign shall "call a meeting of creditors to consider whether his resignation shall be accepted or not, and shall give not less than seven days' notice of the meeting to the Official Receiver" (u).

(11) To be released by the Board of Trade.

On completion of the bankruptcy proceedings (a) the trustee may apply to the Board of Trade, and the Board of Trade shall "cause a report on his accounts to be prepared, and, on his complying with all the requirements of the Board, shall take into consideration the report, and any objection . . . by any creditor or person interested . . . and shall either grant or withhold the release accordingly, subject nevertheless to an appeal to the High Court" (b).

Before making application to the Board of Trade for his release, the trustee must give notice of his intention to all the creditors who have proved their debts and to the debtor, and send with such notice a summary of his receipts and payments (c). On the retirement of a trustee in the case of a composition, this summary and notice are sent to the debtor only (c).

The order of the Board of Trade releasing the trustee discharges him from "all liability in respect of any act done or default made by him in the administration of the affairs of the bankrupt, or otherwise in relation to his conduct as trustee, but any such order may be revoked on proof that it was obtained by fraud or by suppression or concealment of any material fact" (d).

A notice of the order must be gazetted (e), and the release shall not take effect unless and until the trustee "has delivered over to the Official Receiver all books, papers, documents, and accounts which by the Bankruptcy Rules he is required to deliver over on his release" (f).

Duties of the Trustee in Bankruptcy.—The duties of the trustee in bankruptcy in relation to the bankrupt's estate are dealt with hereafter (g), but in addition to these the trustee is under the following duties:

(u) B.R. 333.

(b) B.A. s. 93 (1).

(d) B.A. s. 93 (3).

(f) B.R. 340.

(a) *Vide ante*, p. 117.

(c) B.R. 338.

(e) B.R. 339.

(g) *Vide post*, Chap. 7.

- (1) To insert notice of his appointment in a local paper, after his appointment has been certified by the Board of Trade (*h*).
- (2) To give security "to such officers or persons and in such manner as the Board of Trade may from time to time direct" (*i*).

The amount and nature of such security will be fixed by the Board of Trade, and the Board "may from time to time, as they think fit, either increase or diminish the amount of . . . security which any person has given" (*k*).

- (3) To "keep, in manner prescribed, proper books, in which he shall from time to time cause to be made entries or minutes of proceedings at meetings, and of such other matters as may be prescribed" (*l*).

"A creditor of the bankrupt may, subject to the control of the Court, personally or by his agent inspect any such books" (*l*).

Where the trustee carries on the business of the debtor he must keep a distinct account of the trading, and such trading account must, not less than once in every month, be verified by affidavit and be submitted to the committee of inspection, or to a member appointed by the committee for that purpose, who shall examine and certify the same (*m*).

The books to be kept are a "Record Book," showing "all such matters as may be necessary to give a correct view of his administration of the estate" (*n*), and a "Cash Book" in such form as the Board of Trade may from time to time direct (*o*).

- (4) To "submit the Record Book and Cash Book, together with any other requisite books and vouchers, to the committee of inspection (if any) when required and not less than once every three months" (*p*).

The committee of inspection must, not less than once every three months, audit the cash book (*q*).

- (5) "From time to time, as may be prescribed, and not less than once in every year during the continuance of the bankruptcy," to transmit to the Board of Trade a state-

(*h*) B.R. 327.

(*k*) B.R. 353 (3).

(*m*) B.R. 337.

(*o*) B.R. 361.

(*q*) B.R. 363.

(*i*) B.R. 353 (1) and B.A. s. 19 (2).

(*l*) B.A. s. 86.

(*n*) B.R. 360.

(*p*) B.R. 362.

ment of the proceedings made out in the prescribed form (r).

- (6) "At such times as may be prescribed but not less than twice in each year during his tenure of office" to send to the Board of Trade, or as they direct, an account of his receipts and payments (s).

The account must be verified by a statutory declaration (t). The Board of Trade shall cause the accounts to be audited, and the trustee must furnish the Board with such vouchers and information as may be required (u).

The Rules provide that a copy of the Cash Book in duplicate shall be furnished at the expiration of six months from the receiving order, and at the expiration of every succeeding six months thereafter until the release of the trustee (a); the trustee must also send in his accounts to the Board of Trade, when the estate has been fully realised and distributed or if the adjudication is annulled (b).

The accounts must be certified and verified by the trustee (c). The Board of Trade must call the trustee to account for any misfeasance, neglect, or omission, and may require him to make good any loss which the bankrupt's estate may have sustained thereby (d).

"Where a trustee has not, since the date of his appointment or since the last audit of his accounts, . . . received or paid any sum of money" he must at the period when he is required to transmit his estate account, forward to the Board an affidavit of no receipts or payments (e).

- (7) On resignation, release, or removal, to deliver up to the Official Receiver or to the new trustee, as the case may be, all books and other documents in his possession as trustee (f).
- (8) To "have regard to any directions that may be given by resolution of the creditors at any general meeting or by the committee of inspection" (g).

In case of conflict, the directions of the creditors will be deemed to override the directions of the committee of inspec-

(r) B.A. s. 87 (1).

(t) B.A. s. 92 (2).

(a) B.R. 364 (1).

(c) B.R. 364 (3).

(e) B.R. 366.

(g) B.A. s. 79 (1).

(s) B.A. s. 92 (1).

(u) B.A. s. 92 (3).

(b) B.R. 364 (2).

(d) B.A. s. 87 (2).

(f) B.R. 367.

tion (*gg*). The trustee is also subject to the directions of the Court (*h*).

- (9) To "summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise, may direct" (*i*), or whenever so directed by the Court (*k*).
- (10) On the request at any time of any creditor, with the concurrence of one-sixth in value of the creditors (including himself) to call a meeting of the creditors within 14 days, provided that the person at whose instance the meeting is summoned shall deposit with the trustee a sum sufficient to pay the costs of summoning the meeting (*l*).

The sum deposited shall be repaid to the creditor out of the estate if the creditors or the Court so direct (*i*).

The trustee has power under s. 79 (3) to apply to the Court for directions as to whether a requisition for a meeting shall be acted on or not and the Court has jurisdiction to direct a trustee not to call a meeting, even although the object of the meeting may be to remove the trustee (*m*). The duty of the Court is "to consider all the circumstances, including the purposes for which the meeting is to be called, and if the Court is satisfied that no useful end can possibly be served by the meeting, or for any other reason it was not right or proper that the meeting should be held, it is the duty of the Court to refuse to make any such order" (*n*).

- (11) To answer any inquiry made by the Board of Trade and submit to examination on oath by the Court and to a local investigation of his books and vouchers (*o*).
- (12) Not to "pay any sums received by him as trustee into his private banking account" (*p*).
- (13) In such manner and at such times as the Board of Trade, with the concurrence of the Treasury, direct, to pay the money received by him to the Bankruptcy Estates Account at the Bank of England (*q*).

(*gg*) B.A. s. 79 (1).

(*h*) *Vide ante*, p. 121.

(*i*) B.A. s. 79 (2).

(*k*) B.A., Sched. I, § 5. *Vide ante*, p. 92.

(*l*) B.A., s. 79 (2) and Sched I, § 5. *Vide ante*, p. 92.

(*m*) *In re Burn* (No. 2); *Dawson v. McClellan* (1931), 101 L.J. Ch. 113.

(*n*) *Per FARWELL, J.*, in *In re Burn* (No. 2) (*supra*).

(*o*) B.A. s. 81 (2) and (3).

(*p*) B.A. s. 88.

(*q*) B.A. s. 89 (2).

In certain circumstances payments may be made into a local bank (*qq*).

- (14) Not, except by leave of the Court, while acting as trustee, either directly or indirectly, to become purchaser of any part of the estate (*r*).

Any such purchase made contrary to this rule may be set aside by the Court (*r*).

For an example of a case where the Court gave consent to a sale by the trustee in bankruptcy to a company promoted by the trustee in bankruptcy and the committee of inspection, see *Re Spink* (*s*). The test seems to be whether "the scheme is one for the benefit of the general body of creditors" (*per* PHILLIMORE, J., at p. 573).

- (15) Where the trustee carries on the business of the debtor, not, without the express sanction of the Court, to purchase goods for the carrying on of such business from the trustee's employer or "from any person whose connection with the trustee is of such a nature as would result in the trustee obtaining any portion of the profit (if any) arising out of the transaction" (*t*).
- (16) Not to "make any arrangement for or accept from the bankrupt, or any solicitor, auctioneer, or any other person that may be employed about a bankruptcy, any gift, remuneration, or pecuniary or other consideration or benefit whatever beyond the remuneration fixed by the creditors and payable out of the estate," nor to "make any arrangement for giving up, or give up, any part of his remuneration . . . to the bankrupt, or any solicitor or other person that may be employed about a bankruptcy" (*u*).
- (17) Whenever required by any creditor, to "furnish and transmit to him by post a list of the creditors showing the amount of the debt due to each creditor" (*a*).

The trustee may charge for such list and for postage (*a*).

- (18) On being called upon by any creditor, with the concurrence of one-sixth of the creditors (including such creditor) to "furnish and transmit to the creditors a

(*qq*) B.A. s. 89 (2); cf. *ante*, p. 119.

(*r*) B.R. 347.

(*t*) B.R. 348 (1).

(*a*) B.A. s. 84.

(*s*) (1913), 108 L.T. 572.

(*u*) B.A. s. 82 (5).

statement of the accounts up to the date of such notice" (b).

- (19) To supply a copy of the accounts (or any part thereof) to any creditor who applies therefor and pays for the same (c).
- (20) To "examine every proof and the grounds of the debt, and in writing admit or reject it, in whole or in part, or require further evidence in support of it" (d).

If a trustee rejects a proof, "he shall state in writing to the creditor the grounds of the rejection" (d). This duty may also be regarded as a power (e).

- (21) "Subject to the retention of such sums as may be necessary for the costs of administration, or otherwise," to declare and distribute, with all convenient speed, "dividends amongst the creditors who have proved their debts" (f).
- (22) To pay "any unclaimed dividend which has remained unclaimed for more than six months," and "any unclaimed or undistributed money arising from the property of the debtor," to the Bankruptcy Estates Account at the Bank of England (g).

Enforcement of Orders of Court against Trustee, Debtor, and Others.—Where default is made by a trustee, debtor, or other person in obeying any order or direction given by the Board of Trade, or by an Official Receiver or any other officer of the Board of Trade, the Court may order such defaulting person to comply with the order or direction so given or may make an immediate order for the committal of such defaulting person (h).

(b) B.A. s. 85. As to the cost of such accounts, *vide* B.R. 346.

(c) B.R. 345.

(d) B.A., Sched. II, § 23.

(e) *Vide ante*, p. 123.

(f) B.A. s. 62; *vide post*, Chap. 12.

(g) B.A. s. 153 (1).

(h) B.A. s. 105 (5); *vide ante*, p. 37. Cf. *In re Allen*, [1935] Ch. 74.

CHAPTER 6

RELATION BACK

ONE effect of the adjudication of a debtor to be bankrupt is to vest in the trustee in bankruptcy a title to the bankrupt's property. This means that the property is divested from the debtor and vested in his trustee, with the result that the debtor cannot make any valid disposition of the property to a third party. If any purported disposition of the debtor's property is made the property can be recovered by the trustee from the third party subject to the exceptions later considered. The rules governing the various kinds of property which will vest in the trustee will be considered in the following chapter.

Owing to the time which must elapse between petition and adjudication, there is opportunity for dishonourable transactions tending to defeat the rights of the trustee and so defraud creditors. Consequently, the Act has provided that it is not only the property actually vested in the debtor at the date of adjudication which will pass to the trustee in bankruptcy. The Act has fixed an earlier date for ascertaining the property vested in the debtor for the purpose of conferring a title on the trustee. Although the debtor only becomes bankrupt at the date of the order of adjudication, the title of the trustee relates back to an earlier period and the principle involved is called *the doctrine of relation back*.

Date of the Commencement of Bankruptcy.—The Act s. 37 provides that the title of the trustee shall relate back to the time of the first proved act of bankruptcy on which the petition resulting in adjudication could have been filed. This means that it is the first proved act of bankruptcy within three months of the date in which the petition was filed. The bankruptcy is said to commence with this act of bankruptcy, which is called the first *available act of bankruptcy*.

It will be observed that the first available act of bankruptcy may be older than the petitioning creditor's debt, but this will not render the petition invalid (s. 37 (1)).

Operation of Relation Back.—The effect of this section expressed in wide terms is that the trustee in bankruptcy will be

able to set aside all transactions which lessen the bankrupt's estate, and which have occurred after the act of bankruptcy which is deemed to be the commencement of the bankruptcy. Lord ESHER, M. R., stated the principle in *Re Pollitt (a)* thus:

"The result of the relation back is that all subsequent "dealings (i.e. *subsequent to the act of bankruptcy*) with the "debtor's property must be treated as if the bankruptcy had "taken place at the moment when the act of bankruptcy was "committed. The debtor must be considered as having become "a bankrupt the moment the deed (*which was in this case the "act of bankruptcy*) was executed. 'Then he, being a bankrupt, "all the money which he then had, and all the money which was "owing to him, passed to the trustee in the bankruptcy for the "purpose of being distributed by him amongst the bankrupt's "creditors" (b).

A recent example of the operation of this principle may help to make it clear.

In *Re Dombrowski, Ex p. The Trustee (c)*, a trader hopelessly insolvent, transferred his business to a private company of which he was practically the sole shareholder. This transfer was held to be an act of bankruptcy as a fraudulent conveyance under s. 1 (1) (c) (d). After the transfer two mortgagees advanced £1,000 each to the trader on the security of debentures of the company constituting a charge on the business which had been transferred. The lenders had no notice that the conveyance to the company had been fraudulent and so void as against any trustee in bankruptcy, but within three months of the transfer of the business a petition was filed on which the trader was adjudicated bankrupt. By reason of the doctrine of relation back the business vested in the trustee as from the date of its transfer to the company, which was an available act of bankruptcy. Therefore, the company was not deemed to have in itself at the date of the mortgages any property in the business, and could not, therefore, charge it to the mortgagees. The mortgages, consequently, comprised no charge in favour of the mortgagees (e).

From the cases cited it will be seen that if at any time subsequent to the first available act of bankruptcy the debtor has

(a) [1893] 1 Q.B. 455, at p. 457.

(b) For a much more detailed account, too full to be incorporated here, see judgment of FLETCHER MOUTON, L. J., in *Ponsford, Baker & Co. v Union of London and Smith's Bank*, [1906] 2 Ch. 444.

(c) (1923), 92 L.J. Ch. 415.

(d) See *ante*, p. 57.

(e) This transaction was not excepted from the provisions of relation back by s. 45 for reasons subsequently appearing (*post*, p. 136).

had property vested in him, of which he has subsequently disposed, this disposition is invalidated as against the trustee in bankruptcy. For the purposes of the property the debtor is deemed to have become bankrupt at the earlier time and from this time he has no title which he can make to the property, subject to the exceptions dealt with hereafter.

The time is so strictly construed that the title relates back to the actual hour in which the act of bankruptcy was committed (*f*). A distress levied at an earlier hour than the issue of the petition, which was the act of bankruptcy in point, was held to be levied before the title of the trustee in bankruptcy commenced.

Act of Bankruptcy.—Speaking generally, what will constitute an act of bankruptcy has been discussed in an earlier chapter (*g*), but under previous Acts the meaning of act of bankruptcy has been somewhat extended for the purpose of s. 37. Under the old Acts the word was “completed” instead of “committed,” as in s. 37. Under this law it was held that an act of bankruptcy might be inchoate and require some further act to complete it, but that, if it was completed, the time related back to the original act and not its completion. A distinction was drawn between voluntary and involuntary acts of bankruptcy. The principle that the act of bankruptcy was available as an inchoate act was applied to voluntary acts of bankruptcy. Where the act of bankruptcy was involuntary it had to be completed before it could be effective (*h*). There is no direct authority for holding that “completed” will have the same construction as “committed.” It is thought, however, that probably the same principles will apply.

An example of an act of bankruptcy being inchoate, if voluntary, and yet being set aside, appears to exist in the case of *Re Dombrowski* already explained (*i*). Until the property had passed under the conveyance there was no completed act of bankruptcy, but the conveyance was carried back beyond the passing of the property so as to make it ineffective. With regard to involuntary acts of bankruptcy, an example can be seen in *Ex p. Helder* (*j*),

where an agent received money to pay to creditors nominated by the principal in such circumstances as would constitute

(*f*) *Re Bumpus*, [1908] 2 K B. 330. (*g*) Chapter 3.

(*h*) See Williams’ “Bankruptcy,” 15th Ed., p. 229.

(*i*) See *ante*, p. 132.

(*j*) (1883), 24 Ch D. 339.

an act of bankruptcy. The agent did not know when the agency was created that this would be its effect, but learned that it was so before the payment was, or could be, made. The agent did so pay the money, and the question was then raised whether he was liable to refund the sum so paid, on the ground that the trustee's title had already accrued so that the payment could not be authorised by the debtor. It was held that the trustee could not recover the money from the agent, since no act of bankruptcy had been committed until the agent had complied with his principal's orders, *i.e.* had paid away the money. BRETT, M.R. (at p. 344), said:

"But before he (the agent) actually fulfilled his instructions "he did know that if he paid away the whole of the money "the payment would be an act of bankruptcy—a *cessio bonorum* "—on the part of the principal. It would not, however, be an "act of bankruptcy until the payment was completed; there "would not be a *cessio bonorum* until all the property was "ceded. . . ."

EXCEPTIONS TO RELATION BACK

The doctrine of relation back would have a very prejudicial effect on commerce if it were applicable to all transactions. Consequently, most of the ordinary transactions of daily life are excepted from the effect of the section, but these exceptions have to be considered with great care. The exceptions are:

- (1) The Crown is not subject to this section, since it is not referred to in s. 151, and under the Act of 1869 it was so held in *Ex p. Postmaster-General* (k).
- (2) Protected transactions under s. 45.
- (3) Protected transactions under s. 46.
- (4) Protected transactions under the Land Charges Act, 1925, ss. 3 and 7.
- (5) Executions levied within the provisions of s. 40.
- (6) The doubtful case of *Re Sinclair* (l), and the provision that a trustee can grant remuneration for services benefiting the estate.

(k) (1879), 10 Ch. D. 595.

(l) (1885), 15 Q. B. D. 616.

PROTECTED TRANSACTIONS UNDER S. 45

Section 45 is intended to validate as against the trustee usual transactions which are necessary for carrying on the ordinary affairs of life, but which would otherwise automatically be set aside by the doctrine of relation back.

These transactions will only be valid if:

- (i) *bona fide*;
- (ii) of a certain character hereafter described;
- (iii) they are without notice of an act of bankruptcy; and
- (iv) the transactions take place before the date on which a receiving order was made, whether by a court of first instance or on appeal (*m*).

(i) **Necessity for bona fides.**—Section 45 re-enacts s. 49 of the Bankruptcy Act, 1883, which in its turn took the place of ss. 94 and 95 of the Bankruptcy Act, 1869, but with this distinction that the sections in the earlier Acts required “good faith” in the persons dealing with the debtor, while this requirement is omitted in the 1914 Act.

It is, however, generally considered that this good faith must exist, and, indeed, the marginal note to the section in the present Act refers to *bona fide* transactions (*n*). Therefore, the section does not protect a transaction which would be void independently of the doctrine of relation back. Thus, for example, the section will not protect a conveyance of virtually the whole of the debtor’s property to a creditor who has knowledge of other creditors, because he is not acting in good faith. “I cannot help thinking that if a creditor of a debtor “takes the whole, or substantially the whole of the property of “his debtor in payment of a past debt and knowing that there “are other creditors, he cannot be said to be acting in good “faith. On the whole, therefore, I hold that the transaction “in this case is not protected by s. 49 of the Act” (*o*).

In *Re Slobodinsky* (*p*), a transfer by the debtor, then solvent, to a company controlled by himself and created to take over his business was deemed to be subject to notice to the company

(*m*) *Re Teale*, [1912] 2 K.B. 367.

(*n*) See observations of CLAUSON, J., in *Re Simms* [1930] 1 Ch. 211.

(*o*) s. 49 of the Bankruptcy Act, 1883, replaced by the section now under consideration. *Re Jukes*, [1902] 2 K.B. 58.

(*p*) [1903] 2 K. B. 517.

that the transaction was fraudulent, although a company is a separate entity from its members. WRIGHT, J. (at p. 526), said:

"His co-directors must have been nominees of his because
 "they had no interest whatever of their own . . . his nominees
 "adopted and approved the contracts which he had prepared
 "and entered into. Now, if all that does not amount to notice
 "to a company what does amount to notice to a company?
 "The chairman knows all about it. He holds all the strings in
 "the company and nearly all the shares. I do not know what
 "is notice to a company if that is not. Is notice to be sent
 "to all the shareholders that a man is going to commit a
 "fraud? . . ."

Again, in *Re Simms* (q), CLAUSON, J., held that a transfer by a debtor of substantially the whole of his property was fraudulent if it tended to defeat or delay creditors, and the fact that the transfer was made in good faith with a view to carrying on the business was immaterial.

The case of *Re Simms* (*supra*) also brings out the nature of "good faith" for the purposes of the Act. It is not primarily a question of honesty of purpose, but whether the transaction intended to be carried out may have the effect of defeating or delaying creditors (r). It is clear, however, that the lack of *bona fides* must be on the part of the creditor, and so he must know enough of the nature of the transaction to display that want of good faith.

Again, where a transaction is void under the Bills of Sale Acts, 1878 and 1882, this section does not protect it (s).

At the same time, although the transaction is itself an act of bankruptcy, it was held in *Shears v. Goddard* (t), that it might be protected under the section. A case which was followed in *Bullock v. Ardern* (u), where an *ante-nuptial* settlement was made in favour of a wife who was ignorant of any act of bankruptcy of her husband, and so was protected.

(ii) Protected Transactions.—The transactions to which s. 45 apply are as follows:

- (a) Any payment by the bankrupt to any of his creditors.
- (b) Any payment or delivery to the bankrupt.

(q) [1930] 1 Ch. 211 (cf. *Ex p. Chaplin*, *ante*, pp. 54).

(r) See *ante*, p. 54.

(s) *Re Lavey*, [1918-19] B. & C.R. 116.

(t) [1896] 1 Q.B. 406.

(u) (1901), 17 T.L.R. 285.

- (c) Any conveyance or assignment *by* the bankrupt for valuable consideration.
- (d) Any contract, dealing, or transaction *by* or *with* the bankrupt for valuable consideration.

In all cases these transactions must be supported by valuable consideration. Payments to or by a bankrupt otherwise than in pursuance of a liability will not be protected. In the case of payments to a bankrupt this does not arise, since it is only protection from having to pay over again to the trustee where there was liability. Payments made by a bankrupt, if they are merely gifts, will be set aside under more stringent rules (a).

What constitutes Valuable Consideration – Valuable consideration for the purpose of this section is less extensive in meaning than at the Common Law. If the Court finds that the alleged consideration is colourable only, the transaction is treated as voluntary. So, in *Walker v. Burrows* (b), where there was a settlement purporting to be made for 5s., and other valuable considerations, it was held that proof of real indebtedness was necessary for it to be good against creditors. On the other hand, a transaction on the face of it voluntary may be proved to have been made for valuable consideration (c).

An assignment in respect of existing indebtedness will be treated as being for valuable consideration as, for example, in *Re Dunkley* (d), where the Court upheld an assignment of an existing debt due to the debtor, which was made as security for a liability due to the assignee, who had no notice of an act of bankruptcy.

Decisions respecting the consideration required by s. 45, or the sections replaced by it, have scarcely been made, but the principle, as stated in connection with the rules governing voluntary settlements affected by s. 42, seem to be applicable.

This principle was fully stated in the case of *Re Pope* (e), where a post-nuptial settlement was held to be made for valuable consideration because it was in pursuance of a compromise in respect of threatened proceedings for dissolution of marriage on the ground of misconduct. COZENS-HARDY, M.R. (at p. 172), said:

(a) See *post*, p. 209.

(b) (1745), 1 Atk. 93

(c) *Pott v. Todhunter* (1845), 9 Jur. 589.

(d) [1905] 2 K.B. 683.

(e) [1908] 2 K.B. 169.

"No consideration is mentioned on the face of the settlement, but this is not material, for consideration may be proved by parol testimony . . . but it is contended that the settlement was not made 'in favour of a purchaser' and 'for valuable consideration.' I am unable to follow this argument. That there was valuable consideration is plain, having regard to the finding of the judge as to the bargain. It is decided by authority which binds us that the word 'purchaser' is equivalent to 'buyer' in the same sense in which that word is used in commercial transactions (f), and, on the other hand, that it is something more than a conveyancing term and is not satisfied by a deed, such as an assignment of leaseholds, which suffice to render the assignee a 'purchaser' within the statute 27 Eliz., c. 4 (g). I think it means a person who has given something in consideration of the settlement, or, to use the language of Sir James Hannen, a *quid pro quo*. . . . I am unable to adopt the view that there must be either money or physical property given by the purchaser in order to bring the case within the exception. In my opinion the release of a right or the compromise of a claim not being a merely colourable right or claim may suffice to constitute a 'purchaser' within the meaning of s. 47 (h)."

It will be observed that, although the consideration need not be full (*i.e.* commercially adequate), yet if it be merely colourable, as, for example, the sum of 10s. in a deed, this would not suffice.

This reasoning was applied in the case of *Re Macdonald* (i), where a variation of an ante-nuptial marriage settlement for the payment of the husband's life interest to the wife in lieu of the voluntary allowance previously made to her was held invalid because no right had been relinquished.

In *Re Collins* (k), the release of a right to sue for breach of trust was held to be within the section under consideration.

Types of Transaction Included.—Speaking generally, the types of transaction falling within the section are sufficiently obvious from the description given in the Act. Some further observations with regard to special transactions are called for in this

(f) *Hance v. Harding* (1888), 20 Q.B.D. 732.

(g) Now Law of Property Act, s. 173, by which a voluntary conveyance made in fraud of a purchaser is voidable against a subsequent purchaser. *Ex p. Hillman, In Re Pomfrey*, (1879), 10 Ch. D. 622.

(h) Of the Act of 1883, now s. 42. But see the strong dissenting judgment of BUCKLEY, L.J., at p. 173.

(i) [1920] 2 K. B. 205.

(k) (1914), 112 L.T. 87.

place, and, as will be seen, the cases show that the question is not always free from doubt.

Assignments by Bankrupt.—With reference to conveyances or assignments by the bankrupt it should be noticed that a conveyance or assignment made after notice of an available act of bankruptcy will not be protected merely because it is in pursuance of a contract which would itself be protected (l). In such circumstances any purchaser could and should refuse to complete the transaction pending the outcome of the bankruptcy proceedings. The extent to which such contracts may be enforced by and against a trustee in bankruptcy is discussed later (m).

In *Powell v. Marshall* (*supra*) a purchaser of a leasehold property had paid a deposit to be forfeited on failure to complete. Prior to completion the vendor went bankrupt and it was held that the purchaser should refuse to complete and could recover his deposit.

In the case of sale of goods, where the contract is subject to rescission, a vendor, having made delivery, can recover the goods from the trustee in lieu of proving for their price in bankruptcy. This appears from the decision in the case of *Tilley v. Bowman, Ltd.* (n), where a purchaser obtained a sale of goods upon credit by means of a false representation. The purchaser then pledged the goods, and was subsequently adjudicated bankrupt. The vendor claimed to rescind the contract and recover the goods from the trustee in bankruptcy. HAMILTON, J. (at p. 750), said:

"The right of the trustee is stated by BIGHAM, J., in *In re Eastgate, Ex p. Ward* (o), in these words: 'The trustee acquired
 "the interest of the bankrupt in the property subject to the
 "rights of third parties. One of those rights in this case was
 "the right of the vendors of the goods to disaffirm the contract
 "and to take possession of the goods.' That case, in my
 "opinion, concludes the present one, unless it can be dis-
 "tinguished upon the ground that there the vendor rescinded
 "the contract after the act of bankruptcy, but before the
 "receiving order was made against the purchaser, whereas
 "here the defendants rescinded the contract after the receiving
 "order had been made. To my mind that is not a distinction

(l) *Powell v. Marshall*, [1899] 1 Q.B. 710.

(m) See *post*, p. 183.

(n) [1910] 1 K.B. 745.

(o) [1905] 1 K.B. 465, at p. 467.

"which makes that case inapplicable to the present one. By "ss. 43 and 44 of the Bankruptcy Act, 1883 [Act of 1914, "ss. 37 and 38], the artificial relation back of the trustee's "title to the act of bankruptcy upon which the receiving "order is made . . . is the same in either case, and the "principle upon which that case was decided, namely, that the "trustee acquired the bankrupt's interest in the property subject "to the vendor's right to disaffirm the contract is a qualification "of the trustee's right equally applicable where the rescission is "after the receiving order as where it is after the act of bank- "ruptcy and before receiving order."

The converse of this proposition is that, where a debtor has notice that his creditor has had a petition (*p*) filed against him, the debtor can refuse to pay even on a judgment recovered by the creditor, and this has been held to be the safest course to pursue (*q*). In this case COZENS-HARDY, M.R., said:

"The debtor, with notice of Grosvenor's act of bankruptcy, "could not safely or properly pay the debt claimed by Gros- "venor, and it is unreasonable that the debtor should be made "bankrupt for not having paid a debt which the trustee might "be, and in the actual event was, entitled to claim.

"A somewhat similar difficulty arose in two cases in this "Court (*r*). In each of those cases the Court took the view "that a plaintiff, who had, to the knowledge of the defendant "committed an act of bankruptcy, ought not to be allowed "to sign judgment against a bank, the bank being willing to "pay the money into Court. . . ."

The principles laid down in these cases clearly emphasise the nature of the contracts which really fall within the scope of the section, and show that the doctrine will support the other party to the contract to the full, provided that his rights arose before notice of the bankruptcy. At the same time they emphasise that it is essential to take no steps in the transaction with the debtor after notice of the possibility that the trustee may acquire a title.

It may be convenient to point out here that transactions, which might otherwise be protected, may be invalidated by reason of another section of the Act, namely, s. 38 dealing with

(*p*) Notice of petition, and not merely an act of bankruptcy, is necessary because of Bankruptcy Act, s. 46 (see *post*, p. 145).

(*q*) *In re A Debtor*, [1912] 2 K.B. 533. See *Ex p. Rabbidge* (1878), 8 Ch. D. 367, where purchaser had to pay twice over if he wanted the property.

(*r*) *Ponsford, Baker & Co. v. Union of London and Smith's Bank*, [1906] 2 Ch. 444, and *McCarthy v. Capital and Counties Bank*, [1911] 2 K.B. 1088.

reputed ownership (s). This is neatly illustrated by the case of *Re Wethered* (t), in which X, a stockbroker, obtained judgment for a debt against Y. Y then became further indebted to X. X subsequently assigned both debts by way of security to Z, who agreed not to give notice of the assignment to Y. X then committed an act of bankruptcy. Following this Y entered into an agreement to pay off the debts by instalments and to give a promissory note. The second debt was to be paid off first. The agreement was entered into with A, a solicitor acting for X and Z, who was ignorant of the act of bankruptcy. Before a receiving order was made Y had made several payments to A, who had passed them to Z, who was also ignorant of the act of bankruptcy. It was held that the judgment debt was in the reputed ownership of the bankrupt, but that s. 45 protected the transaction affecting the later debt.

"A Transaction or Dealing."—What constitutes a "transaction or dealing" with the property for the purposes of the section may be seen in principle from the judgments in the case of *Re O'Shea's Settlement* (u).

In that case, a charging order had been obtained from the Chancery Division, and it was argued that this was a "dealing" which could be protected by s. 49 (now s. 45) of the Act. This view was rejected by the Court of Appeal. LINDLEY, L. J., stated the law as follows:

"But still we cannot throw out of view the real nature of 'a charging order. It is much more akin to an execution than 'to what is commonly called a 'dealing' or 'transaction' (a). 'It must not be forgotten that a charging order is obtained in 'the first instance *ex parte*. You obtain first an order *nisi*, and 'then serve notice of it on the debtor; after which, no doubt, 'you proceed on notice to him. That being the nature of the 'order, I do not think that we should be fairly construing the 'expression 'contract, dealing, or transaction,' if we were to 'hold that such a step, taken behind the back of a debtor, 'without his sanction, and in which he takes no part whatever, 'is a 'contract, dealing, or transaction by or with' him. I think 'that would be stretching the words too far. I do not think 'this is a novel decision, having regard to *Ex p. Pillers* (b), 'where it was held that a garnishee order was not a 'dealing' 'with a bankrupt under s. 94 of the Bankruptcy Act, 1869,

(s) See *post*, p. 194.

(t) [1926] Ch. 167.

(u) [1895] 1 Ch. 325.

(a) It was unarguable that it could be protected as an execution (see *post*, p. 147).

(b) (1881), 17 Ch. D. 653.

"because it was a step *in invitum*, and not in any fair sense "of the word a 'dealing with' him. In substance and in "principle that decision covers the present case. In the "Bankruptcy Act, 1883, the legislature have reverted to the "language of the Bankruptcy Act of 1849, and have introduced again the word 'transaction' after 'dealing.' I doubt "whether anything has been gained by that. 'Contract, dealing, "or transaction' with the bankrupt means something done by "him. The words do not point to a proceeding in which the "bankrupt is merely passive. And I think it would be straining "the language of s. 14 of the Judgments Act, 1838, which says "that a creditor who has obtained a charging order shall be "entitled 'to all such remedies as he would have been entitled "to if such charge had been made in his favour by the judgment debtor,' if we were to hold that it means that the "creditor is to be deemed to be a person in whose favour such "an agreement to charge has been made. . . ."

In the same case Lord HALSBURY said:

"It seems to me that a 'transaction' is very much the same "thing as a 'dealing.' I cannot get out of the general idea that "what the legislature really intended to protect by that section "was *bona fide* dealings with the bankrupt as a trader which "had been completed before notice of an act of bankruptcy."

It must not, however, be thought that any order of the Court would necessarily be construed not to be a dealing within the section, since in the case of *Re Gershon and Levy* (c), HORRIDGE, J., definitely suggested, though *obiter*, that a charging order, which had been made as a result of a compromise, would be a "dealing or transaction" within this section. It must be observed that in this case the order was the result of an agreement between the parties which resulted in a compromise. In such circumstances it differs from the other decisions where the order of the Court was made against the will of the other party.

(iii) **Notice of the Act of Bankruptcy.**—Since the requirement of notice is purely statutory, and has not grown up as an equitable doctrine, it has not received the same interpretation. It is, therefore, necessary to consider the judicial decisions on the subject rather than apply principles concerning the doctrine of notice in equity which are familiar in the law of property.

The whole subject was reviewed in the case of *Re Boocock* (d),

(c) [1915] 2 K.B. 527, at p. 533.

(d) [1916] 1 K.B. 816.

where a purchaser of certain property had received notice that a bankruptcy notice had been issued but had not then expired. The purchaser received information from his solicitor respecting the bankruptcy notice, but his solicitor was also told that it probably would not be proceeded with, since the creditors expected to draw the appropriate sum from the proceeds of sale. The purchaser completed and was held to be protected, since a bankruptcy notice which had not expired was not an available act of bankruptcy. ROWLATT, J., laid down the doctrine of notice applicable to acts of bankruptcy in the following terms: "We have to deal with an Act of Parliament "which speaks of notice of an act of bankruptcy. We are not "concerned with inquiry as to what degree of knowledge or "imputed knowledge is sufficient to raise an equity against "another person within the doctrines of the Court of Chancery. "It is quite clear that notice need not be a formal intimation; "knowledge of the fact is enough; and it is also quite clear "from the authorities which have been cited that knowledge "of facts which tell one of an act of bankruptcy is knowledge "and notice of an act of bankruptcy. When a question arises "as to whether the facts that are known are sufficient to tell "the recipient of that knowledge of an act of bankruptcy the "question has to be decided upon a reasonable view of the "facts in the particular case. Further, it is clear that a person "cannot say he has no notice of an act of bankruptcy if he has "shut his eyes to information which he must have known would, "if he had kept his eyes open, have informed him of an act of "bankruptcy. But in this case we are asked to say that a man "has notice of an act of bankruptcy merely because he has not "followed up the development of the situation which was "created by the service of a bankruptcy notice of which he had "knowledge which bankruptcy notice without his knowledge "in fact has subsequently matured into an act of bankruptcy. "There is no decided case which goes anything like as far as "that."

In *Herbert's Trustee v. Higgins* (e), the Court went even further because the creditor, who had notice of the bankruptcy notice, was told by a creditor that he contemplated bankruptcy proceedings, but it was held that s. 45 was not excluded until the time provided in the bankruptcy notice had expired.

It will be observed that knowledge of acts from which an inference may reasonably be drawn constitutes notice. Such acts would be leaving home and place of business in difficulties (f);

(e) [1926] Ch. 794.

(f) *Smith v. Osborn* (1858), 1 F. & F. 267.

but knowledge that a debtor intends to give notice of suspension of payment is not notice of an act of bankruptcy, although knowledge that he is about to suspend payment is an act of bankruptcy (*g*).

Notice of a petition is notice of an act of bankruptcy. A petition can only be issued where an act of bankruptcy has occurred, or the issue of the petition is itself an act of bankruptcy, as when it is filed by the debtor (*h*).

Notice to an Agent.—The Act does not prescribe that notice to an agent is notice to a principal for the purpose of excluding this section. It seems, however, to have been assumed that notice to an agent may be sufficient in certain circumstances. Notice to an agent is not necessarily notice to the principal; for example, notice to a sheriff's officer in possession is not notice to the execution creditor (*i*). However, notice to a creditor's solicitor received in the course of the particular matter in which it is sought to fix his client with notice will be notice for the purpose of the section (*k*).

Date of Receiving Order.—The section protects transactions made without notice of an act of bankruptcy, which includes notice of a bankruptcy petition. Apparently, a transaction, which might be suspect as a fraudulent preference but not impeachable because occurring after petition (*l*), may be a protected payment by the bankrupt, provided that the payee receives the money in good faith in respect of an existing debt due to the bankrupt (*m*). In *Re Seymour* (*supra*) the debtor paid off an overdraft, thereby releasing his guarantor from liability, after the petition had been filed. The bank acted in good faith and without notice of an act of bankruptcy or petition. It was held that the bank was protected.

On the other hand, the section does not protect a transaction made after the date of a Receiving Order whether or not notice of

(*g*) *Re Morgan* (1895), 2 Mans. 508.

(*h*) *Re Gershon and Levy*, [1915] 2 K.B. 527. LINDIFY, L.J., doubted whether this would be so if petition were dismissed (*Re O'Shea's Settlement* [1895], 1 Ch., at p. 332).

(*i*) *Ex p. Schults* (1874), L.R. 9 Ch. 409.

(*k*) *Brewin v. Briscoe* (1859), 28 L.J.Q.R. 329.

(*l*) *Re Badham* (1893), 10 Mor. 252.

(*m*) *Re Seymour* (1937), 106 L.J. Ch. 367. This case followed *Re Dunkley*, [1905] 2 K.B. 683, and did not follow *Re Badham* (*supra*) in so far as the opinion of VAUGHAN WILLIAMS, J. (at p. 257) might be construed that protection could not be given under s. 45 to any case where a fraudulent preference might be suspected. The point arises, because in the case of fraudulent preference *bona fide*s on the part of the recipient of the payment is irrelevant.

the Receiving Order has been received (*mm*). This rule, however, has been modified to some extent by the Bankruptcy (Amendment) Act, 1926 (s. 4), which, in effect, provides that where notice of the Receiving Order has not been gazetted, and also where the person, to whom payment or transfer of property belonging to a debtor is made, has no notice of the receiving order, then such a person will not be held liable to refund to the trustee the loss to the debtor's estate caused by the transaction.

There is, however, a proviso in s. 4 which prevents its application where the Court is satisfied that the trustee is not reasonably likely to recover the whole or some part of the money or property from the person to whom it was transferred. So, for instance, if the debtor bought food and consumed it, presumably the shopkeeper would be unable to plead this section for protection, though he would be protected if the receiving order had not been made.

PROTECTED TRANSACTIONS UNDER S. 46

Section 46 of the Bankruptcy Act extends the protection afforded by s. 45 in the case of payments of money or delivery of goods made to a debtor, or his assignee, who is subsequently adjudged bankrupt. The section substitutes for the requirement of no notice of an act of bankruptcy the less stringent rule of no notice of a petition. Hence, a transaction made before receiving order, but with notice of an act of bankruptcy, will be valid provided the party making the payment or delivery to the bankrupt has no notice of any petition. This is, however limited by the express proviso that such transactions must be made in the ordinary course of business or otherwise *bona fide*.

There do not appear to be any judicial decisions upon the meaning of this proviso, so that it is conceived that any *bona fide* transaction (*n*) will be protected whether or not it is in the ordinary course of business, and in this connection the section does not differ from its predecessor. On this reference may be made to Lord HALSBURY's words in *Re O'Shea's Settlement* (*o*).

The Bankruptcy Act, 1926 (s. 4) (*p*) may not apply to this section, so that payment after the actual date of receiving order, but before advertisement of the order, would not be protected (*q*). There does not appear to be any decision

(*mm*) *Re Warren*, [1938] Ch. 725; where a Receiving Order and a payment are made on the same day the Receiving Order is treated as prior in point of time because it is a judicial act.

(*n*) See *ante*, p. 135.

(*p*) Referred to above.

(*o*) Cited *ante*, p. 141.

(*q*) *Re Wigzell*, [1921] 2 K. B. 835.

actually in point and the question is whether money or property to be paid or delivered to a person may be said to be money or property of the bankrupt prior to payment or delivery. It is thought that there are strong arguments for either point of view.

REGISTRATION OF LAND CHARGES

Land Charges Act.—With regard to *legal* estates in land the preceding two sections have to be modified by the effect of the Land Charges Act, 1925, ss. 3, 6, and 7. It would seem that a *bona fide* purchaser for money or money's worth who has no notice of an available act of bankruptcy will be protected against the effect of a petition or receiving order, unless it is registered in the Land Registry and a receiving order requires re-registration every five years. Furthermore, notice of a petition which is not registered will not be notice of an act of bankruptcy (*r*). If, on the other hand, a petition or receiving order is registered this may constitute notice of its existence, whether the purchaser has in fact notice or not, since registration is deemed to be actual notice of what is registered. On the other hand, it may be argued that the provisions of s. 198 of the Law of Property Act has no relation to "notice" under the Bankruptcy Act, but to the doctrine of equitable notice (*t*). The Act says that registration shall "constitute actual notice of such instrument or matter and of the fact of such registration, to all persons and for all purposes connected with the land affected."

Land Registration Act.—Where land is registered under the Land Registration Act, 1925, petitions and receiving orders will be entered on the Register and not under the Land Charges Act: s. 61 (2) (3). Until the petition is registered it does not affect a purchaser for money or money's worth, even if he has notice of it, nor is the petition notice of an available act of bankruptcy (*u*). Furthermore, a purchaser appears to be similarly protected even against a receiving order unless it is protected by a bankruptcy inhibition, that is, an entry on the Register, unless the purchaser has actual notice. In the event of either a petition or receiving order the purchaser could not be protected if he had notice of an available act of bankruptcy (*a*).

(*r*) Land Charges Act, 1925, s. 3 (2).

(*s*) Law of Property Act, 1925, s. 198 (1). Cf. *Re Forsey and Hollebone's Contract*, [1927] 2 Ch. 379.

(*t*) See *ante*, p. 000.

(*u*) Land Registration Act, 1925, s. 61 (2). (*a*) *Ibid.*, s. 61 (6).

EXECUTIONS

Benefit of Execution may be Protected.—Sects. 40 and 41 of the Bankruptcy Act, which require to be read together, make special provision for the effect upon executions of a receiving order made against the judgment debtor.

Section 40 provides that no execution creditor can retain the benefit of his execution or attachment of goods, lands, or debts against the trustee in bankruptcy unless the execution has been completed before the date of receiving order and without notice of a petition or an available act of bankruptcy other than the seizure and sale in the particular execution (b), which is, of course, itself an act of bankruptcy (c).

Where the judgment under which the execution is levied exceeds £20 the sheriff must hold the proceeds of sale, or money paid in order to avoid sale, for fourteen days and, if within that time, notice is served upon him of a bankruptcy petition, and a receiving order is made thereon, or any other petition of which the sheriff has notice, the sheriff shall pay the balance of such money after deducting the costs of the execution to the official receiver and not to the execution creditor (d).

The policy of these sections seems to have been clearly stated in reference to sections of the old Acts, which have been replaced by the sections in discussion, in *Re Cripps, Ross & Co.* (e).

"The general notion of the Act seems to be that a creditor
 "shall not have the benefit of his execution, if, before sale,
 "notice is given to the sheriff or, if the amount being over
 "£20, notice is given to the sheriff within fourteen days after
 "the date of the sale. That seems to give fair notice to creditors
 "of the time within which a petition in bankruptcy must be
 "presented, and if fourteen days are allowed to pass without
 "the presentation of a petition the legislature seems to consider
 "that the execution creditor should reap the benefit of his
 "diligence" (*per CAVE, J.*).

Although it is convenient to treat of these sections in connection with the doctrine of relation back, it is not at all clear that they have the effect of protecting creditors against the effect of that doctrine. There does not appear to be any strict

(b) B.A. s. 40 (3).

(d) B.A. s. 41 (2).

(c) B.A. s. 1 (1) (e), see *ante*, p. 63.

(e) (1888), 21 Q. B. D. 472.

authority on the point. The difficulty may be thus explained. Assume that X owes Y a sum of money under a judgment. Y, in ignorance that X has committed an act of bankruptcy, issues an execution which is completed by seizure and sale under the provisions of these sections, and the money is paid to Y. Subsequently, a petition is filed upon which a receiving order is made, and the original act of bankruptcy is an available act of bankruptcy within s. 37. Can the trustee claim to recover the money from Y, since the execution is not a transaction within s. 45 (*f*)? If ss. 40 and 41 do not confer protection upon the creditor as well as restrictions upon his rights, then the creditor is bound in such circumstances to repay the money.

It was suggested in *Wild v. Southwood* (*g*), by VAUGHAN WILLIAMS, J., in connection with the similar section of the 1883 Act, that it was simply restrictive in contrast with the section cognate to s. 45. Section 45 is expressly made subject to the provisions of ss. 40 and 41 (see sub-s. 1). It will be observed that this view (of VAUGHAN WILLIAMS, J.) does not quite accord with passage from the judgment in *Re Cripps, Ross & Co.*, cited above, but the point was probably not in the learned judge's mind. The point was also raised in *Re Fairley* (*h*), but was not decided. It remains obscure, and so doubtful that it is difficult to hazard an opinion; though it may be pointed out that s. 40 (1) says that the benefit shall not be obtained, unless execution is completed prior to the date of the Receiving Order or notice of the presentation of a bankruptcy petition or any *available* act of bankruptcy. It might be argued that unless the section was protective there is little point in the requirement of notice. It has, however, been held that the trustee is not limited to the period of relation back in recovering sums of money falling within the sections, so that money paid before the earliest available act of bankruptcy could be recovered (*k*), though this case is no longer an authority on the particular facts (*l*).

Scope of the Sections.—Until very recently the most difficult point, which had been frequently litigated, was the circumstances which would “complete” the execution. This

(*f*) *Re O'Shae's Sett*, [1895] 1 Ch. 325 (see *ante*, p. 141).

(*g*) [1897] 1 Q.B. 317.

(*h*) [1922] 2 Ch. 791.

(*i*) See, however, *Williams' Bankruptcy*, 15th Ed., p. 317.

(*k*) *Re Keen*, [1932] 1 Ch. 555.

(*l*) *Re Andrew*, [1937] Ch. 122.

aspect of the matter has received a new twist by reason of those decisions culminating in *Re Andrew (supra)*, upon the "benefit of the execution," which has excluded most of the former points from the preview of the sections altogether. Unless the money claimed by the trustee in bankruptcy is "the benefit of the execution" no question can arise concerning the effect of the sections. In *Re Godwin (m)*, execution was levied, but the judgment debt was then paid to the creditor, on whose instructions the sheriff unconditionally withdrew. The judgment debtor subsequently was adjudicated bankrupt and the trustee claimed to recover the money so paid to the creditor on the ground that the execution had never been completed by seizure or sale before the date of the bankruptcy. A Divisional Court held that the payment to the creditor to avoid further proceedings was not a "benefit of the execution" and could not be recovered since it did not fall within s. 40. In *Re Samuels (n)* after execution levied, the judgment debtor promised to repay the debt by instalments. In consequence of this agreement the sheriff, acting on instructions from the judgment creditor, withdrew, reserving the right to re-enter in default of payment of instalments. The debtor paid some instalments and then became bankrupt. FARWELL, J., held that the instalments so paid did not form part of the benefit of the execution and did not fall within the section. In *Re Andrew (supra)* the Court of Appeal was called upon to reconsider the whole matter on facts substantially similar to those of *Re Samuels (supra)*. In this case the instalments were paid to the sheriff's officer and remitted to the creditors. After payment of some of the instalments the creditors received a circular letter which constituted an act of bankruptcy. In consequence of the circular letter the sheriff re-entered and sold, but a receiving order was made against the debtor. The sheriff paid the proceeds of sale to the Official Receiver and it was not denied that this sum fell within the section. The Court of Appeal held that the instalments so paid were not a "benefit of the execution" and so were not within s. 40. The principle, which is to govern whether payments properly fall within the scope of the section, was laid down in the judgment of Lord WRIGHT, M. R. (in which the other members of the Court concurred). He said (at p. 135): "To the extent that the creditor has been paid his debt under and in virtue of an

(m) [1935] Ch.213.

(n) [1935] Ch. 341.

execution, the debt is *pro tanto* discharged, and to that extent there is, in our opinion, nothing on which s. 40 can operate. The operation of the section in such cases is limited to cases where there is at the date of the receiving order or when the creditor has notice of a bankruptcy petition or of an act of bankruptcy, still on foot a subsisting execution, and is limited to the balance for which the execution is still operative. In respect of that balance it is true that there is a benefit of the still incomplete execution which may be affected by the operation of s. 40 (1). In this connection the result is the same whether the payment has been made to avoid seizure or to avoid sale, or whether the partial discharge of the debt has been effected by a sale of goods and an execution which is kept on foot in order, if possible, to realise enough to pay the balance of the debt. We think, however, that s. 40 cannot apply if there is no subsisting execution, and that it is immaterial, if there is no execution on foot, whether the execution has been terminated by a return that the whole debt has been realised, or whether the execution has been withdrawn by the sheriff at the request of the creditors, or whether there has been a return of *nulla bona* or he has withdrawn for any other reason. Section 40, in our opinion, can only apply if, or to the extent that, there is a subsisting execution which is still operating to charge the debtor's goods, and it cannot operate in so far as goods have already been sold and the proceeds applied to the partial discharge of the debt, or where payments on account have been made by the debtor in order to avoid seizure or sale, or to induce a temporary withdrawal by the sheriff."

This exhaustive survey of the circumstances in which the "benefit of the execution" can exist makes it clear that for practical purposes where money has been paid to the creditor prior to receiving order, and without notice of a petition or act of bankruptcy, it will not fall within s. 40. By the same token it will only be protected by s. 45 if it is a transaction or dealing within that section. It is suggested that it may be so protected, at least when the payment is made, to avoid seizure or sale on the ground that it is not entirely involuntary (o), but the matter seems to be open.

Completion of Execution.—Prior to the cases just considered, the principal difficulty of s. 40 was found in deciding

(o) cf. *Re Gershon and Levy*, [1915] 2 K.B. at p. 533.

whether or not the execution had been completed, since this was necessary to protect the creditor. Many of the leading cases on this subject have been overruled on their particular facts by the decision in *Re Andrew (supra)*, since by virtue of this decision the facts did not fall within s. 40, though in the cases themselves this was assumed to be so. It will be noted, however, in the extract from the judgment given above that the Court of Appeal did not deny that in certain of the circumstances there mentioned the execution may have been incomplete, and consequently the authority of the older cases may still hold on this point. How material the point may be is not easy yet to determine in practice, but it will be observed that in *Re Andrew (supra)* some of the proceeds of the executions were paid to the Official Receiver.

Section 40 (2) lays it down that:

an execution is completed by seizure and sale;
an attachment of a debt by receipt of the debt; and
an execution of land by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

With reference to land, it need only be remarked that a writ of *elegit* employed for this purpose does not extend to goods (*p*).

In *Re Hobson (q)*, the Court held that if seizure was complete it was immaterial that the sheriff had not made a formal return to the writ.

Where a debt is attached by way of garnishee proceedings and is paid into Court pending the determination of a claim by a third party this is not a receipt of the debt by the execution creditor. Therefore, notice of an available act of bankruptcy before payment out to him will prevent his reaping the benefit of the garnishee proceedings (*r*).

Seizure and Sale.—The general principle was laid down that only seizure and sale would complete an execution.

In *Re Ford (s)*, WRIGHT, J., said: "I am not aware of any other mode of completion of an execution (than by seizure and sale)."

(*p*) Bankruptcy Act, 1883, s. 146 (unrepealed).

(*q*) (1886), 33 Ch. D. 493.

(*r*) *Butler v. Wearing* (1885), 17 Q.B.D. 182.

(*s*) [1900] 1 Q.B. 264, at p. 267.

This minimum was extended, however, in the case of *Figg v. Moore* (t), by the incorporation of the words of s. 41 (1), then s. 11 Bankruptcy Act, 1890, "the receipt or recovery of the full amount of the levy" (u).

(i) *Money Paid to Avoid Seizure or Sale*.—Money paid to avoid a seizure (a), and money paid to avoid a sale followed by withdrawal of the execution (b) will not be within the section, but where money is paid in partial discharge of the debt and the execution is temporarily withdrawn, the execution is apparently incomplete (c). In *Re Pearson* (d) it was held that the goods of the debtor are bound from the issue of the writ of execution, so that the charge will be subsisting in respect of any balance of a judgment debt.

(ii) *Sale*.—"The sale is not completed until enough has been sold to satisfy the debt of the execution creditor" (e). This is, apparently, subject to the principle that moneys already paid to the creditor arising from such a sale will be in partial discharge and fall outside s. 40 (f).

(iii) *Payments into Court*.—Where a sheriff has entered into possession but an interpleader summons is issued and, in consequence, a sale is carried out and the money is paid into Court, this is a completion of the execution; "the sale was by the sheriff in his capacity as sheriff under the writ of *fiari facias* not under some other trust or duty imposed by the interpleader Acts" (g).

Of course, if notice of a petition is given within fourteen days the proceeds will be paid to the trustee in bankruptcy under s. 41 if the judgment debt exceeds £20 (g). It has been held that where a petition was not filed for three months the execution creditor would be entitled, even if the seizure had not been followed by sale within twenty-one days, although this seizure by the sheriff would constitute notice of an available act of bankruptcy independently of the sale, yet it had ceased to be an available act of bankruptcy by the time the petition was filed (h). In this case the interpleader to recover from the

(t) [1894] 2 Q.B. 690.

(u) cf. HORRIDGE, J., in *Re Godding*, [1914] 2 K.B. 70; but in *Re Andrew* (supra) Lord WRIGHT, M.R. (at p. 134) expressed the opinion that it was illegitimate to import the words of s. 41 into s. 40.

(a) *Bower v. Hett*, [1895] 2 Q.B. 51, 337.

(b) *Re Andrew*, [1937] Ch. 122.

(c) And see per LAWRENCE, J., in *Re Fairley*, [1922] 2 Ch., at p. 801.

(d) (1892), 9 Mor. 182.

(e) *Re Andrew* (supra).

(g) DAY, J., in *Heathcote v. Livesley* (1887), 19 Q.B.D. 285.

(h) *Re Chiandetti* (1922), 91 L.J.K.B. 70.

sheriff was taken out by a person claiming under a voluntary assignment, which would have been void under the Bankruptcy Act, s. 42 (i), so that the donee would apparently take an interest by reason of her judgment and execution which she could not have taken in the bankruptcy. It is, however, a matter of some doubt whether this is the correct principle to apply, since the relation between ss. 40 and 41 and the doctrine of relation back appears to be somewhat obscure (k).

Notice to Sheriff.—Under s. 41 (2) where the judgment exceeds £20 the sheriff must have notice of a bankruptcy petition presented by or against the debtor within fourteen days of sale or money paid to avoid sale. Notice of an act of bankruptcy is not within the section. In *Latter v. Jukes* (l),

where after sale and within fourteen days the sheriff received notice of a bankruptcy petition, on which the judgment debtor could have been adjudged bankrupt, but the bankrupt himself petitioned after the fourteen days had expired and the order for adjudication was made on this petition, it was held that the proceeds passed to the trustee in bankruptcy under s. 41. It was decided that the words “or any other petition of which the sheriff has notice” was not limited to petitions issued within fourteen days.

Furthermore, where a registrar of a County Court was also high bailiff and in that capacity retained money received in respect of an execution, notice of a petition received as registrar was held to be sufficient notice for the purpose of the section (m).

Protection of Purchaser from Sheriff.—“A person who purchases the goods in good faith under a sale by a sheriff shall, in all cases, acquire a good title to them against the trustee in bankruptcy” (n).

Duties of Sheriff in Sale.—It is convenient in connection with these provisions to refer to the duties of a sheriff concerning the sale and proceeds of sale, but only a few points can here be noticed.

Where the sheriff has notice, after seizure, of a receiving order he must hand over the proceeds of sale or the goods, and if the Official Receiver does not request delivery of the goods

(i) See *post*, p. 209.

(l) [1927] 1 K.B. 17.

(n) B.A. s. 40 (3).

(k) See *ante*, p. 147.

(m) *Re Harris*, [1913] 1 Ch. 138.

he must sell. If the sale is in respect of a judgment for more than £20 the sale must be by auction (*o*), and, in any event, if he has notice of other executions he must inform creditors of a proposed sale by private treaty (*p*).

The exemption of tools, etc., of a debtor to the value of £20 provided by Bankruptcy Act, s. 38 (2) (*q*) does not apply to sales by the sheriff, since the exemption of only £5 by 8 & 9 Vict. c. 127, s. 8, is followed (*r*).

The goods must be the goods of the same person against whom the petition is presented. Thus, if execution is levied against a firm, while an individual partner has a receiving order made against him, s. 41 does not apply, and the execution creditors take the proceeds of sale (*s*).

Similarly, where there is more than one execution, and some are under £20 and others over, and notice of a petition is given to the sheriff within fourteen days, the execution creditors and the trustee take the proceeds of sale according to the priorities of the executions respectively (*t*). Thus, if the amount of the proceeds is sufficient to pay the first three executions of which one is less than £20, this debt will be paid to the creditor, as the execution was completed and not within s. 41, though the trustee will receive the proceeds applicable to the debts over £20 under that section.

A sheriff is indemnified by Bankruptcy Act, 1913, s. 15 (unrepealed), in respect of money paid to an execution creditor in respect of the sale of goods in the possession of a judgment debtor, unless he "had notice or might by making reasonable inquiry have ascertained that the goods were not the property of the execution debtor." The section also provides that the purchaser will get a good title. The sheriff also has an indemnity in respect of rent paid to a landlord under Bankruptcy Act, s. 35 (3).

REMUNERATION OF SOLICITOR

Re Sinclair.—It was decided in *Re Sinclair* (*u*), that money which has been paid to a solicitor to oppose bankruptcy

(*o*) Bankruptcy Act, 1883, s. 145 (unrepealed).

(*p*) Bankruptcy Act, 1890, s. 12 (unrepealed).

(*q*) See *post*, p. 177.

(*r*) *Re Dawson*, [1899] 2 Q.B. 54.

(*s*) *Dibb v. Brooke & Sons*, [1894] 2 Q.B. 338.

(*t*) *Re Pearce* (1885), 14 Q.B.D. 966.

(*u*) (1885), 15 Q.B.D. 616.

proceedings cannot be recovered by the trustee, *although usually the solicitor must have notice of an act of bankruptcy* (v). The grounds of the decision appear to be that to hold otherwise would work hardship, if not total injustice, owing to the difficulty in any other event of obtaining legal advice.

The case has been doubted, and definitely held incapable of extension (w), but was followed in *Re Johnson* (x). Furthermore, the money must be ready money paid over and earmarked for the purpose (y).

REMUNERATION BY THE TRUSTEE

Moreover, the trustee may pay for any services which have been useful to the creditors after a strict investigation to limit claims to those items only which have been of benefit (z). The trustee has a discretion in this respect, but the Court remunerated a trustee under a deed of arrangement although the Official Receiver refused to do so (a).

In *Re Charlwood* (b), a solicitor was held entitled to retain money paid in rather peculiar circumstances. On November 30 a coroner's jury found a verdict of murder against C. for an illegal operation. C. then sold some property, and on December 3 he agreed in writing to pay a solicitor a sum of £250 (further to a payment of £25 already made) for which the solicitor was to conduct C.'s defence at the police court and trial, and to defray all expenses in connection therewith. On December 21 the solicitor received notice of an act of bankruptcy committed on December 20, but he conducted the defence, and the verdict was manslaughter. It was held on the subsequent bankruptcy that the solicitor was entitled to retain the money.

AGRICULTURAL CHARGES

The Agricultural Credits Act, 1928, s. 8 (5), provides that where a farmer has created an agricultural charge within three months of the presentation of a petition, upon which he is

(v) Usually, but not necessarily so, the defence may be a denial of the act of bankruptcy and there may be good grounds for substantiating the denial. But notice of a petition is notice of an act of bankruptcy *Lucas v. Dicker* (1880), 6 Q.B.D. 84.

(w) *Re Pollitt*, [1893] 1 Q.B. 455 (*supra*).

(x) (1914), 111 L.T. 165.

(y) *Re Whitlock* (1894), 1 Mans. 33

(z) *Re Geen*, [1917] 1 K.B. 183.

(a) *Re Foster* (1895), 72 L.T. 364.

(b) [1894] 1 Q.B. 643.

adjudicated bankrupt, and the charge secures any sum owing to the bank immediately prior to the creation of the charge, then the amount thereby secured is reduced by the amount owing immediately prior to the charge, unless the farmer is proved to be solvent immediately after the execution of the charge. This is without prejudice to the right of the bank to enforce any other security or claims as an unsecured creditor.

This provision introduces a new period time in ascertaining a debtor's property because it appears to be irrespective of, and in addition to, the doctrine of relation back. It should, however, be noted that it is expressed to be limited to sums owing to the bank *immediately prior* to the charge.

CHAPTER 7

PROPERTY DIVISIBLE AMONG CREDITORS

Property Divisible.—Under s. 18 (1) upon adjudication “the property of the bankrupt shall become divisible among his creditors and shall vest in the trustee,” or where no trustee has been appointed the property vests in the Official Receiver until such time as a trustee may be appointed (a). If the property first vests in the Official Receiver, it is automatically transferred to and vests in the trustee on appointment (b).

“Property” is defined by s. 167 to include “money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate interest and profit, past or future, vested or contingent, arising out of or incident to property as above defined.”

Section 38 describes the property divisible among the creditors, but it is incomplete. The section is concerned with two exceptions where the property does not vest in the trustee noted hereafter. The section then continues that the property of the bankrupt shall comprise:

- (i) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge.
- (ii) The capacity to exercise all powers in respect of property which might have been exercised by the bankrupt for his own benefit, except the right of nomination to an ecclesiastical benefice.
- (iii) All goods being in the “reputed ownership” of the debtor, dealt with in the next chapter.

It will be observed that this section incorporates the doctrine of relation back (dealt with in the last chapter) by reason of the reference to the commencement of the bankruptcy. This is one case in which property not vested in the bankrupt at the date of adjudication will become vested in the trustee. The section also includes two other cases. First, it refers to

(a) B.A. s. 53.

(b) B.A. s. 53 (2).

property acquired subsequently to adjudication and before discharge; and secondly, it provides for the case of "reputed ownership." It is provided elsewhere in the Act for certain transactions to be avoided under s. 42, and there are also cases of other voidable transactions. These cases of property not vested in the bankrupt at the date of the adjudication are dealt with in the ensuing chapter. This chapter is concerned only with such property as may be vested in the debtor at the date of adjudication.

Vesting of Trustee's Interest.—As vesting under the Act is by operation of law, the transfer must not be treated as if it were on the same footing as a conveyance *inter vivos*. For example, it was held, in respect of the corresponding sections of the Bankruptcy Act, 1883, that the transfer was not such a conveyance as could be registered under the Middlesex Registry Act, 1708, with the result that the Official Receiver took priority over a mortgagee registered under the Act, whose mortgage was made fraudulently by the debtor after the adjudication in bankruptcy (*c*). Since deeds can no longer be registered in the Middlesex Deeds Registry the case has no further application to the facts, land in Middlesex now falling within the Land Registration Act, 1925.

Although the trustee in bankruptcy takes the whole of the debtor's property as defined above and explained in Chapters 6, 7 and 8, yet it must be remembered that he does not take as a *bona fide* purchaser of the legal estate without notice. Consequently, the trustee takes the property, subject to all existing equities (*d*), save in so far as those equities have been created in such a way that they will not be protected by the specific bankruptcy rules; as, for example, where the beneficiaries' interest has been created by way of a voluntary declaration of trust made by the bankrupt within two years immediately preceding the bankruptcy (*e*).

WHAT CONSTITUTES PROPERTY

It is, however, necessary to ascertain what may constitute property for the purposes of s. 18 of the Act. Quite apart altogether from the rules excluding or including property under the doctrine of relation back and other rules swelling the assets, not all possibilities of interests, though not in-

(i) *Re Calcott and Elkin's Contract*, [1898] 2 Ch. 460.

(d) See *post*, p. 169.

(e) See *post*, p. 209.

frequently described as interests in property, fall within its compass.

Perhaps it is well to start with an enunciation of the principle that governs the subject contained in *Smith v. Coffin* (f). The case was decided in 1795, and, consequently, is not a decision on any modern bankruptcy legislation, but appears to be good law. In this case the question was whether a right of action to recover land passed to the official assignee in bankruptcy, and EYRE, C. J., said:

"It is true that on general principles rights of action are
"not forfeitable nor assignable except in a particular mode;
"but that rule is founded on the policy of the Common Law
"which is averse to encourage litigation; but in this case the
"policy of the bankrupt laws requires that the right of action
"should be assignable and transferred to the assignees as much
"as any other species of property. . . . Here the policy is
"that every right belonging in any shape to the bankrupt
"should pass to his assignees. And this being the clear intent
"of the law, a particular recital of this species of right could
"not be necessary." (g).

It will be seen, therefore, that rights, although not assignable *inter vivos*, formerly a more important class than now, will pass to the trustee in bankruptcy.

The view of what is property for the purposes of bankruptcy law stated in *Smith v. Coffin* (supra) is clearly that adopted in the definition contained in s. 167 of the Act mentioned above. Two modern cases may illustrate the principle. In *Re Pearson* (h) a testator by his residuary gift left his property, *inter alia*, to his son who died in the testator's lifetime, leaving issue surviving the testator. The son, before his death, became bankrupt. By virtue of s. 33 of the Wills Act, 1837, the son's interest in the residuary gift did not fail owing to the survival of issue, and the son was, for the purpose of the Wills Act, deemed to die immediately after the testator. It was held that the property passed to the trustee in the son's bankruptcy.

(f) (1795), 2 H.Bl., at p. 461.

(g) The decision on the facts is modified with reference to rights of action arising under a third party risks policy of insurance by the Third Parties (Rights against Insurers) Act, 1930, which prevents the right of a bankrupt insured becoming vested in the trustee, but vests it in the party having a right of action against the insured; cf. s. 11 of the Road Traffic Act, 1934, which extends the rights of the third party in the cases falling within that Act.

(h) [1920] 1 Ch. 247

In *Re Keene* (i) the debtor was the owner of a manufacturing business which included making articles under a secret formula which had never been reduced to writing. The trustee claimed that the debtor must disclose the formula as part of the goodwill of the business. The debtor argued that a secret formula could not be the subject-matter of property. The Court directed that the formula must be disclosed.

An illustration of the difficulty that may arise is to be found in *Parkinson v. Noel* (k), where it was held that a statutory tenancy under the Increase of Rent, etc. Acts did pass to the trustee in bankruptcy, and in *Sutton v. Dorf* (l), where the earlier case was not followed. Between the first and second of these two cases there had been a number of decisions on the nature of the statutory tenancy and they had not adopted the same view of it expressed in *Parkinson v. Noel* (*supra*), namely, that the tenant had "an interest or profit in the property." This conflict displays not only the occasional difficulty of determining the ambit of property, but also the reliance in large measure on the general law.

It is impossible to deal in detail with the subject, but there are one or two cases calling for special attention. First, interests determinable on bankruptcy may not pass to the trustee because, though they are clearly property in the hands of the debtor, the interest ceases on his bankruptcy. Secondly, interests in expectancy have given rise perhaps to most difficulty. Thirdly, goodwill is a peculiar form of property that it may be convenient to mention. Fourthly, powers of appointment have received express attention from the legislature.

Interests determinable on Bankruptcy.—An interest can be made to determine automatically on bankruptcy by means of a specially constructed limitation of the interest. It is a purely technical question whether a condition imposed on a gift of an interest in property that it shall determine on bankruptcy operates to create a determinable interest. If the interest is *not determinable* the condition may be effective to enable the interest to be forfeited on bankruptcy. Where an interest can be forfeited but is not determinable, it will vest in the trustee until the exercise of the right of forfeiture. A condition determining an interest on bankruptcy may be valid as a determinable interest, which would be invalid if found to operate by way of

(i) [1922] 2 Ch. 475.
(l) [1932] 2 K.B. 304.

(k) [1923] 1 K.B. 117.

forfeiture. The law governing the creation of determinable interests and the validity of conditions excluding bankruptcy is complicated, and should be studied elsewhere (*m*).

A typical example of a determinable interest is a trust limited to a legatee for life or until he becomes bankrupt. The effect of such a limitation would be that if the legatee becomes bankrupt the interest ceases and does not vest in the trustee. In fact, the gift need not contain so express a declaration as a proviso for failure on bankruptcy to have that effect. An example of a provision so construed is to be found in *Re Laye* (*n*).

An alternative method of achieving somewhat similar objects is to be obtained by giving the property to trustees upon trust to pay in their absolute discretion the income to the object contemplated or certain other named persons, *e.g.* his wife and/or children. In these circumstances the intended beneficiary has no interest which will pass to the trustee in bankruptcy, since it is in the discretion of the trustees of the settlement to pay him nothing. The result is peculiar because the trustees may go on paying income from time to time to the bankrupt provided that it is no more than he requires for the maintenance of himself and his family (*o*).

This method has become so familiar that such a "protective trust" (as it is called) can be incorporated in settlements by the use of a simple formula under the Trustee Act, 1925, s. 33 (*p*). In point of fact, a discretionary trust is the only method by which a person can settle property upon himself in such a manner that it will not pass to his trustee in bankruptcy upon adjudication, because any express provision for determination upon bankruptcy is void (*q*).

Forfeiture of Lease.—In connection with provisos for determination on bankruptcy it is necessary to refer to the peculiar position of the proviso for re-entry on such an event contained in a lease. As the proviso for re-entry creates an

(*m*) See Cheshire: *Modern Real Property*, 4th Ed., Chap. VI.

(*n*) [1913] 1 Ch. 298 (see this case more fully, p. 178, *post*).

(*o*) See *post*, p. 180.

(*p*) The protective trusts are so framed that the donee would take a life interest until the bankruptcy, and then the discretionary trust would come into effect. Consequently, the section will not be suitable to a settlement of a person's own property on himself, as in such a case the discretionary trust must be immediate, because a suitor cannot include a condition determining his own interest in bankruptcy (*Re Brewer's Sett.*, [1896] 2 Ch. 503 (see *post*, p. 180).

(*q*) *Higinbotham v. Holme* (1811), 19 Ves. 88 (see *post*, p. 178).

interest liable to forfeiture and not a determinable interest, the lease will not be determined until the lessor recovers possession. Furthermore, statute has provided generally that bankruptcy does not immediately enable the lessor to re-enter and recover possession.

The right to forfeiture is governed by the Law of Property Act, 1925, s. 146. The lessor has the right to immediate entry if the proviso for re-entry is contained in a lease of

- (1) agricultural or pastoral land;
- (2) mines or minerals;
- (3) a house used or intended to be used as a public house or beer shop;
- (4) a house let as a dwelling-house with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures; or
- (5) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the nature or character of the property, or on the ground of neighbourhood to the lessor or to any persons holding under him.

In all other cases, if the property is sold within a year the lessor can only claim forfeiture after service of notice to forfeit and subject to the right of the lessee to apply for relief under the general provisions of the section. During the first year after bankruptcy, although it is not so sold, forfeiture can only be obtained on the same terms, but after the expiration of the year there is apparently no requisite of notice, and relief could not be granted (*r*) except, perhaps, that an under lessee of the bankrupt could apply for relief under the Law of Property (Amend.) Act, 1929. Pending forfeiture, however, the lease will vest in the trustee in bankruptcy (*s*).

Expectant Interests.—The definition of property includes contingent interests. A contingent interest, properly so called in the law of property, can only exist where a trust fund has been created, and it is necessary only to fulfil some condition in order to take a vested interest. So, under a will a gift of residue to the testator's son on attaining twenty-one will be a contingent interest if the testator is dead and the son

(*r*) *Civil Service Co-operative Society v. Trustee of McGregor*, [1923] 2 Ch. 347; *Pearson v. Gee*, [1934] A.C. 272.

(*s*) See *post*, p. 183.

is under twenty-one. Until the testator is dead the son only has a hope that the will may not be revoked prior to the testator's death, so he has no interest, vested or contingent properly so called, but a "spes successionis," sometimes called an expectancy.

Although an expectancy is not exactly within the description of property, it is possible to have valid dealing in equity (*t*). A purported assignment of such an expectancy has been held enforceable in equity (*u*), but it is suggested that the true principle is that, until an assignment has been made after a vested interest has arisen under the original purported assignment, the matter is one rather of contract than of property.

This view is not altogether in line with some modern authority. For the purposes of bankruptcy, it certainly has been laid down that an expectancy would not pass to the trustee in bankruptcy, but these decisions may be of limited authority. The best illustration is, perhaps, to be found in *Ex p. Dever* (*a*).

In that case a husband effected a policy, the proceeds of which were to be paid to his wife on her husband's death or at her option to be drawn out ten years after its date. Her husband had an expectancy in the event of no payment being made to either his wife or children, should she die and no children survive. In fact, the wife drew out the policy moneys at the expiration of the period of ten years. These moneys were claimed by the trustee in bankruptcy after the date of the husband's discharge as an interest which had existed during bankruptcy. The Court held that the trustee in bankruptcy had no interest under the policy, and FRY, L.J., gave these reasons at p. 670:

"Now what was the nature of that marital right (*i.e.* the "right of the husband)? It could only arise in the event of the "policy having been previously terminated by lapse or death. "If either of these two contingencies had happened, the option "to receive the accumulation in cash could not arise. And, if "the option did arise, it was an option to adopt one or other of "four alternatives (*e.g.* to leave the policy to mature on husband's "death). How could the interest of the husband be 'property' "in the event of the wife's exercise of the wife's option on a "double contingency, which had not happened at the time when "he obtained his discharge? How could it be said that any " 'property' was vested in him at his discharge? It was the

(*t*) See *Re Lind*, [1915] 2 Ch. 345 (*post*, p. 164).

(*u*) *Holroyd v. Marshall* (1862), 10 H.L.C. 191.

(*a*) (1887), 18 Q.B.D. 660.

"mere hope of a hope that something might come to him by reason of his surviving the ten years and his wife's exercising her option in that particular manner. It was a mere *spes*, and there was nothing that could vest in the trustee in bankruptcy."

This case should be compared with *Re Pearson*, referred to earlier (b). Furthermore, it must be considered in the light of the more recent case of *Re Lind* (c).

In *Re Lind* (c) a son entitled to an expectant share under the intestacy of his mother, who was and had been for years insane, mortgaged his interest. He subsequently became bankrupt, and finally was discharged. He then mortgaged his interest to another party. On his mother's death it was held that the prior mortgages were not extinguished by the discharge in bankruptcy, and took priority over the subsequent mortgage on the ground that it was something more than a contractual liability. SWINFEN EADY, L.J. (at p. 360), stated the ground briefly thus:

"An assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for."

Compare with this case *Re Dent* (d).

It will be observed that *Re Lind* (*supra*) was concerned with the validity of a purported dealing with an expectancy. As has been pointed out, in equity validity is given in the appropriate circumstances to such dealings so that there was no reason, if the property did not vest in the bankrupt's trustee, why the dealing should not be upheld. The earlier case was concerned solely with the question whether an expectancy is sufficiently property to vest in the trustee. It may seem peculiar to hold that an expectancy is sufficiently property to be validly charged, so the charge is not destroyed, as a debt due from the bankrupt, by a discharge, and yet not sufficiently property to vest in a trustee in bankruptcy. This is perhaps an illogical solution, but is probably the law.

(b) See *ante*, p. 159.

(c) [1915] 2 Ch. 345: followed in principle in *Re Warren*, [1938] Ch. 725, where an arrangement to guarantee an overdraft operated as an equitable assignment.

(d) [1923] 1 Ch. 113 (dealt with later, p. 219).

Goodwill.—Goodwill requires mention from its frequent occurrence. Goodwill is property, but of a peculiar kind. It attaches primarily to the business premises which vests in the trustee and, since this is so, the goodwill also vests.

Express provision is contained in the Bankruptcy Act, s. 55, enabling the trustee to sell the goodwill of a debtor's business. As has been seen, this will include even a secret unwritten formula (e).

There is, however, a peculiarity about sales of goodwill by a trustee. It had been held that on a sale of goodwill the vendor could not solicit his former customers (f), but in *Walker v. Mottram* (g), the Court of Appeal decided that, since the transfer was involuntary, this rule did not apply to the debtor, so that he was not restrained from such solicitation (h).

Powers of Appointment.—The trustee may exercise all powers vested in the debtor *for his own benefit*. The limit thus imposed renders the section inapplicable to most special powers of appointment since they are really exercisable for the benefit of the objects alone. This has been brought out in the recent case of *Re Taylor's Settlement Trusts* (i). Here the settlor had reserved to himself power to require the income to be paid as to one half to himself and one half to his wife as an alternative to accumulation and investment as directed. EVE, J., held that the power was indivisible and as it was not exercisable so as to benefit the settlor alone, the trustee could not exercise it at all. The learned judge said (at p. 439): "The bankrupt cannot exercise (the power) for his own benefit alone during his wife's lifetime. He can only exercise it for their mutual benefit, and although if he does exercise it any benefit he may derive therefrom will pass to the trustee. I do not think a power to appoint to oneself and another can properly be described as a power to appointment for one's own benefit."

Again, a general power of appointment, which is clearly exercisable for the benefit of the donee, can only be exercised in the donee's lifetime (k), and if it is exercisable only by will,

(e) *Re Keene*, [1922], 2 Ch. 475 (*ante*, p. 160).

(f) *Labouchere v. Dawson* (1872), L.R. 13 Eq. 322. See now *Trego v. Hunt*, [1896] A.C. 7.

(g) (1881), 19 Ch. D. 355.

(h) This has been extended to deeds of arrangement (*Green v. Morris*, [1914] 1 Ch. 562).

(i) [1929] 1 Ch. 435.

(k) *Nichols to Nixey* (1885), 29 Ch. D. 1005.

does not pass to the trustee at all (*l*). The right to *release* a power and thereby vest property in the debtor indefeasibly does not fall within the section, and therefore a trustee may not execute a release to benefit the debtor's estate (*m*).

PROPERTY NOT PASSING TO THE TRUSTEE IN BANKRUPTCY

Property, which will not pass to the trustee in bankruptcy although vested in the debtor at the date of adjudication or deemed so to be vested by the doctrine of relation back, is partly covered by statute and partly by the general law. The Bankruptcy Act, s. 38, provides that

- (1) Property held by the bankrupt on trust for any other person;
- (2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife, and children, to a value inclusive of tools and apparel and bedding, not exceeding £20;

do not pass to the trustee in bankruptcy.

But there are also certain other cases which are summed up in Williams on Bankruptcy (*n*), as follows:

- (3) The operation of bankruptcy as a condition subsequently defeating the bankrupt's interest;

to this reference has already been made (*o*), since the property ceases to be vested in the bankrupt (*p*).

- (4) The operation of bankruptcy *qua* insolvency in qualifying the contractual rights which the bankrupt as a solvent man possessed;
- (5) The personal nature of the right vested in the bankrupt;
- (6) The express exceptions created by sections of the Bankruptcy Act (or other statute);
- (7) Upon grounds based on the general policy of the law.

To this list must be added:

- (8) The rights under the Third Parties (Rights against Insurers) Act, 1930, together with the Road Traffic Act, 1934, s. 11.

(*l*) *Re Guedalla*, [1905] 2 Ch. 331; cf. *Re Benzon*, [1914] 2 Ch. 68.

(*m*) *Re Rose*, [1904] 2 Ch. 348.

(*n*) 13th edition, at p. 243. In the current (15th) edition the list is somewhat different in classification.

(*o*) *Ante*, p. 160.

(*p*) But see *post*, p. 178.

PROPERTY HELD ON TRUST BY TRUSTEE BANKRUPT

What Trust Property will Not Pass.—Taking first the express exceptions of Bankruptcy Act, s. 38, it is necessary to examine the case of the bankrupt trustee. That his interest *prima facie* will not pass to the trustee in bankruptcy follows from what has been said (q) respecting the fact that a trustee in bankruptcy can only take subject to existing equities. Where, however, the bankrupt is simply a bare trustee of the legal estate, having no beneficial interest, not even the legal estate will pass to the trustee in bankruptcy, but where he has some interest it will do so (r).

In *Morgan v. Swansea Urban Sanitary Authority* (r) a vendor had let a purchaser into possession before completion, and it was held by JESSEL, M.R., that he was not a bare trustee of the legal estate, since he had a lien for unpaid purchase-money, and hence the legal estate vested in the trustee in bankruptcy of the vendor. As JESSEL, M.R., said (at p. 585): "Where a 'trustee has no beneficial interest the legal estate does not pass 'but where he has it does.'"

This case was approved in *St. Thomas' Hospital v. Richardson* (s).

There X, a trustee of leaseholds with onerous covenants, went bankrupt. Afterwards the trustee in bankruptcy assigned the leaseholds back to X to hold upon the trusts, and he was discharged. When the lessors later sued X for breach of covenant he pleaded that his bankruptcy protected him, although the lessors had had no notice:

Held, that X had had an interest in the lease since he was entitled to an indemnity against the covenants out of the property, hence it had properly vested in the trustee in bankruptcy, who had reassigned to X, so that his discharge had not relieved him from any liability. FLETCHER MOULTON, L. J., said (at pp. 278, 279):

"By s. 44 (now 38) the property so divisible (among creditors) 'does not include 'property held by the bankrupt on trust for 'any other person.' This follows from the principle that the 'Court of Bankruptcy is a Court of Equity, and was the law 'long before it was specifically provided by statute. 'The 'meaning of the provision is evident; it is that property held 'by the bankrupt does not go to form part of his divisible 'estate, if and so far as he holds it in trust for another person."

(q) *Ante*, p. 159.

(r) *Morgan v. Swansea Urban Sanitary Authority* (1878), 9 Ch D. 582.

(s) [1910] 1 K.B. 271.

"But as the bankrupt has a beneficial interest in property it
 "passes to his trustee to form part of his divisible estate, and
 "this none the less because the balance of the property is
 "held by the bankrupt in trust for others. The trustee in
 "bankruptcy will take the same position in respect of the
 "property as the bankrupt; he will hold it on the same trusts and
 "be entitled to the same beneficial interest and no more."

But the learned judge went on to suggest that the trustee in bankruptcy might sell the interest that passed to him beneficially and leave the bankrupt as trustee. This would not be quite consistent with what has been laid down as the broad principle, but is modified by his explanation at pp. 279, 280:

"A complication arises, however, where the trust property
 "in question entails liabilities on the trustee. . . . By the
 "operation of the bankruptcy the bankrupt is stripped alike
 "of his property and of his liabilities; and, inasmuch as the
 "legal estate involves liabilities and carries with it a contingent
 "beneficial interest in the shape of indemnity, the solution can
 "no longer be found in allowing the legal estate to remain in
 "the bankrupt. It must pass to the trustee, who will then hold
 "the property on the same trusts as those on which the bank-
 "rupt previously held it. . . ."

This appears to coincide with the judgment of COZENS-HARDY, M.R., in the same case, namely, that the legal estate as well as the beneficial interest will vest in the trustee in bankruptcy, where it is desirable to protect or render more effective such beneficial interest. It follows that any beneficial interest enjoyed by the bankrupt will always pass.

Estate Owner under the Settled Land Act.—There is one case, however, where the legal estate will never pass, although the beneficial interest will, and that is where the bankrupt is an estate owner under the Settled Land Act, 1925, because that Act (s. 104) provides that the legal estate shall remain in the estate owner, unless and until the estate owner becomes absolutely and beneficially entitled to the settled land free from all limitations, powers, and charges taking effect under the settlement (t).

This is really only an application of the principle above

(t) Provision is made that he may be divested of his powers so that they may be exercised by the trustees of the settlement (Settled Land Act, 1925, s. 24). A sale by the trustee in bankruptcy of the beneficial interest to the person next entitled under the settlement renders it the duty of the estate owner to execute a vesting deed in favour of the purchaser under s. 104 of the Settled Land Act (*Re Shawdons, S. E.*, [1930] 2 Ch. 1).

mentioned, that the legal estate will only pass to the trustee where necessary to protect his beneficial interest, which is here supposed to be amply provided by the Settled Land Act itself.

Debtor's Right to Indemnity.—Where the debtor is a trustee, and thereby becomes entitled to an indemnity in respect of the trust property, *e.g.* where a trustee of leaseholds pays rent in respect of them, as he is liable to do, or is made liable in respect of covenants under the lease, this right to indemnity will pass to the trustee in bankruptcy (*u*).

Property subject to Equities.—The more difficult cases, however, which arise under this head are those, where the property is subject to equities in the hands of the debtor, which are not strictly regarded as trusts. These cases fall, for practical purposes, under two heads:

- (i) Where the debtor has a special interest only in the property; and
- (ii) Where the debtor has appropriated property to meet a special liability before he has been adjudicated.

(i) **Where the Debtor has a Special Property** (*a*).—It is not possible to refer to all the individual cases to which this group applies, since it is largely a matter of the general law whether the bankrupt has only a special property in any subject-matter. It must suffice to give, by way of example, one or two instances.

The general principle is that, where the subject-matter of a special property in the bankrupt can be distinguished from the general mass of the debtor's property, it will not pass to the trustee, though he may exercise any lien arising from the nature of the transaction (*b*). Of course, this principle might be set aside by reason of the fact that the property had come under the reputed ownership clause (*c*).

Property received as Agent.—One important example of this principle is the case of property received as agent, *i.e.* to be applied in a specific manner. Thus, where money was paid to a debtor expressly for the purpose of paying certain pressing

(*u*) *Re Richardson, Ex p. St. Thomas' Hospital*, [1911] 2 K.B. 705.

(*a*) The expression "special property" is a technical term to explain the peculiar nature of an interest not amounting to full ownership, but constituting more than mere possession enjoyed in certain circumstances, the most familiar of which is a bailment, *e.g.* where goods are lent to a person.

(*b*) *Jennings v. Mather*, [1902] 1 K.B. 1.

(*c*) See *post*, p. 194.

creditors, it was held not to pass to the trustee in bankruptcy (*d*).

Another instance, drawn from the analogous liquidation of a company, can be seen in the decision in *Re Farrow's Bank* (*e*).

In that case a customer brought in a cheque for collection, but before the bank had actually collected it, it stopped payment. The bank had provisionally credited the cheque to the account of the customer, but it was held that until the cheque had been collected the relation of principal and agent for the purposes of collecting the debt alone existed, and that therefore the customer was entitled to receive the amount in full and not as a creditor in the bankruptcy.

Security for Current Account.—Again, property held simply as security for a current account gives to the person holding it only a special property, which will not pass (*f*).

Stockbrokers had a running account with a client, who lodged certain share certificates with them as cover. Without his knowledge the brokers sold the certificates and ultimately went bankrupt.

It was held that the proper order was to take an account in chambers of the amount due from the client, and of the value of the shares lodged, not at the date of sale, but at the date of the certificate of the Master as to the account, since the rights of the client were that at the date when the account between him and the brokers was settled he should receive back his shares. As this was impossible he was to receive their value at that date. "The effect of the bankruptcy was to close "the account which had been running, and to transfer the "rights of the brokers to the trustee in their bankruptcy. But "the rights of the trustee were no larger than had been the "rights of the brokers, and were subject to the condition as to "the return of the securities" (*g*).

(ii) Appropriation to meet Special Liabilities.—The principle here is that where the debtor has appropriated certain assets to meet a given liability, although the title of the creditor may not be complete in law, yet the property will not vest in the trustee in bankruptcy.

(*d*) *Re Drucker*, [1902] 2 K.B. 237. (*e*) [1923] 1 Ch. 41.

(*f*) *Ellis & Co.'s Trustee v. Dixon-Johnson*, [1925] A.C. 489.

(*g*) *PER CAVE*, L.C., at p. 492. Cf. *Re Benge, Woodall & Co.*, [1912] 1 K.B. 393, where brokers were entitled to raise money for a client by depositing shares with their bank, they deposited shares generally with their own bank to cover overdraft: held that the surplus on total shares was to be applied towards satisfaction of client's shares that were sold.

This is really carrying the doctrine that the trustee takes subject to existing equities to its logical conclusion, since it is giving effect to the equitable claims of the creditor. It would seem that the claim must have a foundation in law or equity and not be a merely moral claim (*h*), and in consequence it is impossible to analyse the cases which may arise, but to give, by way of an example, a decision where the rule has been applied. It may be added that, in most reported cases, the relief claimed by the creditors seems to have been refused on the ground that there was inadequate evidence to support specific appropriation. This, however, did not happen in *Thayer v. Lister* (*k*).

In this case 'T' carried on business in America, and sent bills to a firm with which he was connected in England, but it was held in this instance to them as agent for him, certain goods to be appropriated to meet certain other bills on which P was liable. The English firm treated them as part of the general assets of the firm, and not as specifically appropriated to meet these bills.

It was held that the bank receiving the bills remitted by T with notice of direction, could not properly apply them to meet the general liabilities of the firm, but the specific appropriation to P enabled him to recover the amount against his own bills in priority to general creditors (*l*).

It will, therefore, be seen that something very like an express direction to create a trust will arise. This, however, does not quite cover the sort of cases contemplated, since it would seem that the existence of a lien may affect an appropriation, particularly in cases of assignment of property subject thereto. It is these cases, which cover such a wide field of law, that it is impossible to enter into particularity. One or two rules only can be given.

Rule in Hallett's Case.—Before turning to one or two specific cases of appropriation there is one general principle which must be mentioned, namely, the rule in *Re Hallett's Estate* (*m*),

Where trust funds are intermingled in a current account, together with private moneys, they are deemed to remain a

(*h*) *Re Wait*, [1926] Ch. 692, overruled on another point, [1927] 1 Ch. 606.

(*k*) (1861) 30 L.J. Ch. 427.

(*l*) This case should be compared with *Brown, Shipley & Co. v. Kough* (1885), 29 Ch. D. 848, in which a direction on the face of the bill was not held to constitute specific appropriation, and in which the matter was discussed.

(*m*) (1880), 13 Ch. D. 696.

separate fund, which can be identified. Thus, if A pays trust moneys and his own moneys into a general account and goes bankrupt, the trust money will be deemed not to have been paid out of the account (despite the rule in *Clayton's Case* (n)), except on account of the trust fund.

This, however, is subject to the proviso that if, at any time, the account shall fall below the value of the trust fund that excess of the trust fund over the existing balance will be lost, although the account, at a later date, rises above that sum (o).

These principles are, however, equitable, and will be found more properly and fully dealt with in a textbook on that subject.

Specific Appropriation of Goods.—As an illustration of the fact that this branch of the subject is dependent upon the general rules of law, and owing to its importance in everyday affairs, mention may perhaps be made of the position of a purchaser of goods who has paid the purchase price. Such a purchaser will only be entitled to treat any goods consigned to him as property not vesting in the trustee as part of the bankrupt's property, if he can show that they were specifically appropriated to his contract either at law or equity, according to rules applicable to the general law (p).

In *Re Wait* a sub-purchaser bought from a person, who became bankrupt, 500 tons of wheat ex *Challenger* out of a consignment of 1,000 tons. Before the ship arrived at port the vendor became bankrupt.

It was held that the whole cargo passed to his trustee in bankruptcy, although the price had already been paid. The 500 tons were not sufficiently specific to be appropriated to the contract and so did not pass to the purchaser either at law or equity (q).

Contract induced by Fraud.—At the same time, if a contract was induced by the fraud of the bankrupt the other party

(n) (1816), 1 Mer. 572. The rule in *Clayton's Case* provides generally that where payments out and payments in are made in respect of a current account, it will be assumed that the payments out are to be debited to the payments in according to the corresponding order in point of time. So, if an account is opened with a payment of £100 in March followed by another payment of £50 in May and another £60 in June. If payments out are made of £20 in April, £40 in May, and £50 in June, it will be assumed that the first two payments are in respect of £100 and the remaining payment also in respect of the £150 save as to £10.

(o) *Roscoe v. Winder*, [1915] 1 Ch. 62. (p) *Re Wait*, [1927] 1 Ch. 606.

(q) See, however, strong dissenting judgment of SARGANT, L. J., at p. 641.

could disaffirm even after a receiving order (r). In doing this the innocent party could even retake goods delivered to the bankrupt, without knowledge of the fraud, in pursuance of the contract, provided he did so within a reasonable time (s).

In *Re Eastgate* (s) the debtor, before he was made bankrupt, purchased certain goods upon a fraudulent misrepresentation, *i.e.* without the intention to pay for them. After receiving order, a creditor retook the goods he had delivered in pursuance of the contract:

Held, this was his legal right. BIGHAM, J. (at p. 467), gave his reason: "Now, did the property at the time he (the vendor) took "it back form part of the estate of the bankrupt? I do not think "it did, and for this reason. I think that the trustee acquired "the interest of the bankrupt in the property subject to the "rights of third parties. One of those rights in this case was "the right of the vendors of the goods to disaffirm the contract "and to retake possession of the goods."

It will be observed that these cases of specific appropriation arise as between the debtor and creditor so that a third party will not get the benefit of such appropriation, unless he can claim directly through the creditor. To this principle there is, however, an exception, which is known as the rule in *Ex p. Waring* (t).

The Rule in Ex p. Waring.—The rule has been concisely stated by COTTON, L.J., in *Ex p. Dever* (u)

"As I understand the principle of the rule, it is this—the "Court finds in the hands of a bankrupt certain property which "has been remitted to him by another person also become "bankrupt to secure him against a liability which he has under- "taken upon bills drawn on him by that person. The property "cannot be applied in paying the general creditors of the "acceptor, because it was in his hands impressed with a trust; "nor can it go to pay the general creditors of the drawer, "because he was not entitled to have it back without meeting "the acceptances. The Court thereupon applies the property "in such a way as will carry out as far as possible the equities "between the two estates, *i.e.* paying the acceptances to cover "which it was sent. The rule assumes that the property which "is in the hands of the acceptor is not his own absolute property; "if it was, it would go to pay his creditors generally."

(r) *Tilley v. Boreman*, [1910] 1 K.B. 745 (*supra*, p. 139).

(s) *Re Eastgate*, [1905] 1 K.B. 465, followed in *Tilley v. Boreman* (*supra*).

(t) (1815). 19 Ves. 345.

(u) (1885), 14 Q.B.D. 611, at p. 623.

It will be seen that the rule applies where

- (1) there are bills drawn upon and *accepted by* (a) an insolvent person; *and*
- (2) the drawer of the bill must also be insolvent; *and*
- (3) there must have been securities appropriated to meet the liability on the bill; *and*
- (4) there must be a judicial administration of both drawer and acceptor's estates (b), though it is not necessary for both to have been adjudged insolvent in legal proceedings. For example, the rule will apply where the estate of one of them is being administered on his decease, but where he has never been adjudged bankrupt (c). The distinction may perhaps be clearer if it is pointed out that where a company is being wound up by the Court, but is not insolvent, the rule will not apply (d).

Apparently the rule in *Ex p. Waring* has never been applied except in cases where there are securities deposited to meet bills of exchange.

Third Party.—In *Ex p. Smart* (e), the rule was applied where the securities were deposited by a person subsequently becoming insolvent who was not a party to the bill. The reason for the decision was the equivalent difficulty of adjusting the equities. Hence the third party, namely, the holder of the bill, was accidentally fortunate in that there was no other satisfactory way of applying the securities since “the equity cannot be worked out without the application of such a rule” (*per* JAMES, L.J., at p. 225).

From this decision it may be argued that, wherever there is an administration of two estates giving rise to the same difficulty, although not for the benefit of a holder of a bill of exchange, the rule should be applied.

Security Insufficient.—In *Powles v. Hargreaves* (f), it was held that the rule in *Ex p. Waring* applied, although the securities were insufficient. This decision was, however, not followed in the *Royal Bank of Scotland v. Commercial Bank of Scotland* (g), where SELBOURNE, L.C. (at p. 382), pronounced

(a) *Vaughan v. Halliday* (1874), L.R. 9 Ch. 561.

(b) *Ex p. Gomez* (1875), L.R. 10 Ch. 639

(c) *Ex p. Alliance Bank* (1869), L.R. 4 Ch. 423

(d) *Re The New Zealand Bank* (1867), L.R. 4 Eq. 226

(e) (1872), L.R. 8 Ch. 220

(f) (1853), 3 De G. M. & G. 430.

(g) (1882), 7 App. Cas. 306.

the reason given for the extension of the rule to such a case to be unsatisfactory since "the estate of the bankrupt acceptor may lose some part of the indemnity to which, by the contract, he is entitled." This decision was on Scottish law, and may not be held to overrule the earlier case, but probably, however, it would be followed.

The Rule in *Ex p. James*.—The difficulty of adjusting equities between parties in a judicial insolvency has given rise to a further rule, if it may be so called, that the trustee in bankruptcy must be scrupulously honest in his dealings. 'This honesty means something more than merely keeping within the strict letter of the law, and consequently is very difficult, if not impossible, of definition. The principle was applied in *Ex p. James (h)*, and this case has given its name to the rule.

In *Ex p. James (supra)* an execution creditor had paid to the trustee in bankruptcy a sum recovered under the execution, which the Court of Appeal shortly afterwards declared to have been an unnecessary payment. Money so paid was not, of course, strictly recoverable, since the mistake had been one of law. The Court of Appeal held that the money so paid could be recovered by the execution creditor.

"With regard to the other point, that money was voluntarily "paid to the trustee under a mistake of law, and not of fact, I "think that the principle that money paid under a mistake of "law cannot be recovered must not be pressed too far, and there "are several cases in which the Court of Chancery has held "itself not bound strictly by it. I am of opinion that a trustee "in bankruptcy is an officer of the Court . . . and he is to "hold money in his hands upon trust for its equitable distribu- "tion among the creditors. The Court, then, finding that he "has in his hands money which in equity belongs to some one "else, ought to set an example to the world by paying it to the "person really entitled to it. In my opinion the Court of Bank- "ruptcy ought to be as honest as other people" (*per JAMES, L.J.*, at p. 614).

This decision was explained and applied in *Re Tyler (i)*.

In this case a wife, at the request of her husband, who was subsequently adjudged bankrupt, had paid premiums on his life policy to the date of his death. On his decease the Official Receiver, whose predecessor had received notice of these payments during the public examination, claimed that these payments had passed to him under the bankruptcy:

(h) (1874), L.R. 9 Ch. 609.

(i) [1907] 1 K.B. 865.

Held, that the notice precluded him from setting up the claim. It was argued that the principle in *Ex p. James* was applicable only to money paid under a mistake of law, but VAUGHAN WILLIAMS, L.J., said (at p. 869):

"In that case, the money had been paid under such a mistake of law that it could not be recovered by any judicial process whatsoever—whether in law or in equity. When JAMES, L.J., says that the trustee has in his hands money which in equity belongs to somebody else, he is not referring to an equity which is capable of forensic enforcement in a suit or action, but he is referring to a moral principle which he describes when he says that the Court of Bankruptcy ought to be as 'honest as other people.'"

This principle has been the subject of a number of more recent cases, but it remains clearly established law, though its extent is somewhat vague and undefined. In two recent cases (*k*), while the rule has been recognised, it has been held not to apply to the particular case. In *Re Wigzell* (*kk*), STERNDALE, M.R. (at p. 851), put the rule in these words: "The Court will not permit a trustee in bankruptcy who is its official to do, and certainly will not make an order that he shall do something which, in its opinion, is dishonourable and not high-minded" (*l*).

In *Scranton's Trustee v. Pearse* (*k*) the Court held it to be the duty of a trustee in bankruptcy to recover under the Gaming Act, 1835, moneys paid to a bookmaker by the debtor. The ground of the decision of the Court of Appeal, overruling the judge of first instance, was that, though it might have been discreditable in the debtor, the trustee in bankruptcy must recover what was a statutory debt, since to decide otherwise would be to undertake the administration of the general policy of the country, but "it is the legislature which has to do with the policy of the country and not the judges who administer the law."

The decision in *Re Thellusson* (*m*) contains an exhaustive analysis of the earlier cases, and extends the rule to the furthest point to which it has yet been carried, but the true difficulty of the rule appears that learned judges (as the cases show) may

(*k*) *Re Wigzell*, [1921] 2 K.B. 835 and *Scranton's Trustee v. Pearse*, [1922] 2 Ch. 87. (*kk*) *Supra*

(*l*) Cf. the words of BUCKLEY, L. J., in *Re Tyler*, [1907] 1 K. B., at p. 873: "inconsistent with natural justice, and that which an honest man would do."

(*m*) [1919] 2 K.B. 735.

differ on the same facts as to what an honest man would feel morally bound to do.

In *Re Thellusson* (*supra*) the Court ordered the trustee to refund to a young man £900 which had been borrowed from him by the debtor the day after the receiving order had been made, though the debtor was not, in fact, aware that it had. The debtor had immediately paid the sum into his bank, thus extinguishing the overdraft, and the whole benefit had passed to the trustee.

In *Re Walter* (*n*) a bankrupt had accumulated personal earnings to which the trustee in law became entitled (*o*). The bankrupt, having made a will, died leaving certain debts, and the executors paid his funeral expenses. It was held that the executors were entitled to so much of the accumulations as would pay his funeral expenses, and the creditors for necessaries should also be paid thereout.

In *Re Sandiford* (*No. 2*) (*p*) it was held that counsel had no right to prove for fees received by a deceased insolvent solicitor, who had obtained the fees from his clients on untrue representations that the fees had been already paid to counsel. The Court held that the executors of the deceased insolvent were not in the same position as the trustee in bankruptcy.

Nevertheless, the principle remains rather vague and it is difficult to determine in advance what view the Court will take.

(2) BANKRUPT'S 'TOOLS OF TRADE, ETC.

This exception is straightforward, and in the main has scarcely been the subject of judicial interpretation. In *Re Sherman* (*q*), however, the expression "tools of his trade" was considered.

The debtor was a colonisation agent, and claimed that his testimonials, letters of introduction, documents as to patents, and books of entries relating to distances between places were tools of his trade and did not pass:

Held, that the tools contemplated were the implements of a workman's trade, and consequently the articles in question were not protected.

In a Scottish case it was held similarly that law books were not protected by this section (*r*).

(*n*) [1929] 1 Ch. 647.

(*p*) [1935] Ch. 681.

(*r*) *Pemsel v. Elgin*, [1926] S.C. 9.

(*o*) *Post*, p. 235.

(*q*) [1915] H.B.R. 231.

Furthermore, where an execution has been levied, and the sheriff has proceeded to sell the tools of the debtor, the protection will be limited to £5 (*s*) and not to the £20 of the Bankruptcy Act (*t*). The tools, having been converted into money, cease to be tools, and consequently the trustee in bankruptcy is entitled to the money, because the debtor cannot reconvert it into tools.

(3) PROPERTY WHICH WILL NOT PASS OWING TO FORFEITURE
ON BANKRUPTCY

Forms of Forfeiture Clause and Operation.—Reference has already been made to the effect of clauses rendering interests determinable or forfeitable on bankruptcy (*ante*, p. 161). The cases which arise are fairly numerous in practice owing to the frequency with which protected life interests are inserted in settlements. Their difficulty is largely due to the variations in the phraseology employed in the instruments creating the interests affected. It is only possible by example to examine some of the more common forms of clauses.

Bankruptcy not Mentioned.—Thus, in *Ex parte Eyston* (*u*), although the forfeiture clause did not expressly mention bankruptcy, adjudication was sufficient to render the clause applicable and prevent the property passing to the trustee in bankruptcy.

In that case forfeiture was declared in certain events, including where the life tenant "shall do or permit any act, deed, matter, or thing whatsoever, whereby the same shall be aliened, charged, or incumbered." In fact, he was adjudicated bankrupt on failure to meet a creditor's summons. JAMES, L.J., (at p. 150), said: "If a man has been guilty of default of not paying his debts, why then he is permitting to occur something whereby or by means whereof the property intended for him is aliened or gets into the possession of a stranger who is not intended to be benefited by the estate."

Adjudication Unnecessary.—It is, however, in ordinary cases not necessary for proceedings to go so far as adjudication to work a forfeiture. This is due to the fact that usually provision is made for the interest to pass over in the event of the income becoming payable to any other person. An example of this is *Re Laye* (*a*).

(*s*) See *ante*, p. 154.

(*u*) (1877), 7 Ch. D. 145.

(*t*) *Re Dawson*, [1899] 2 Q.B. 54.

(*a*) [1913] 1 Ch. 298.

In this case the interest of the life tenant was to determine in the event that he should "have his affairs liquidated by an arrangement or composition" or on the income becoming "payable to some other person." A receiving order was made, and the Official Receiver received certain sums of income, but the debtor was never adjudicated bankrupt.

It was held by EVE, J., applying the principle of *Re Sartoris* (b), that the life interest was forfeited. The learned judge said (at p. 302):

"I think his judgment [*i.e.* CHITTY, J., in *Re Sartoris*] establishes this much, at any rate, as a general proposition "that in all cases in which the life interest is to determine "on the happening of any event, whereby the income or any "part of it would, if belonging absolutely to the tenant for life, "be payable to some other person, such determination is "brought about whereon a receiving order is made and income "comes into the hands of the trustees before it is discharged. "He did not decide, and it is not necessary for me to decide, "whether the same result would follow if no income came to "hand while the receiving order was operative."

Presentation of Petition.—Again, it may well be that the presentation of a petition by the debtor himself may amount to "parting with his property" so as to render it liable to a forfeiture clause, because whether he is adjudicated or effects a composition vesting the property in trustees he will be divested of the property (c). At the same time, bankruptcy following upon a creditor's petition will not be a voluntary act such as is intended by such words as "assigning" or "parting with" his property (d). Furthermore, the act or omission of the debtor must clearly affect the particular property in point and not be an assignment of property for the benefit of creditors, which excludes this interest (e).

Ex p. Dawes (e) is a good example of the importance of the particular words employed in the clauses of the relevant documents, and turned largely upon the construction of a deed of composition made to avoid adjudication of the debtor on his own petition. It was held upon construction that the debtor had excluded the particular interest liable to forfeiture, and that, consequently, the decision in *Re Amherst* (ee) did not apply.

Date of Operation of Forfeiture.—Where forfeiture occurs, it operates from the date of relation back, and not from

(b) [1892] 1 Ch. 111.

(c) *Re Amherst* (1872), L.R. 13 Eq. 464.

(d) *Lear v. Leggett* (1829), 2 Sim. 479.

(e) *Ex p. Dawes* (1886), 17 Q.B.D. 275. (ee) *Supra*.

the date of adjudication (f). That is to say, that the trustee in bankruptcy will be entitled only to income due under the Apportionment Act or otherwise from the last payment preceding the bankruptcy to the date on which, under the doctrine of relation back, the bankruptcy is deemed to commence; the balance being due to the person entitled to the property after the forfeiture under the settlement.

Discretionary Trust.—Where, however, the gift over takes the form of a discretionary trust, one of the beneficiaries of which is the debtor, then, if under that trust the trustees pay to him more than is sufficient for his necessary maintenance, it would seem that the trustee in bankruptcy is entitled to the surplus (g). VAUGHAN WILLIAMS, J., in *Re Ashby* (g) (at p. 877) said:

“I am of opinion, having regard to *Holmes v. Penney* (h),
 “that although the presence in this settlement of this dis-
 “cretionary power to the trustees does not make the settlement
 “void as against creditors and may practically, to a great
 “extent, give the bankrupt the advantage of the forfeited
 “estate, or the advantages which he would have gained as
 “the owner of the forfeited estate; yet, inasmuch as the advan-
 “tages can only be gained at the discretion of the trustees,
 “it seems to me on the authority of that case that if the trustees,
 “in the exercise of their discretion, do pay the rents and profits
 “of this estate to the bankrupt to the extent to which sums are
 “paid to the bankrupt in excess of the amount necessary for
 “his mere support, then the trustee in bankruptcy will be
 “able to insist upon the bankrupt accounting to him for the
 “rents and profits so received.”

Determinable Interest of Settlor.—It has already been, explained that a settlor cannot give himself an interest in his own property determinable on bankruptcy. If he does so, the gift over on bankruptcy fails, and the property passes to the trustee in bankruptcy.

The principle is one of the common law of bankruptcy, and was expressed so early as *Wilson v. Greenwood* (i):

“The general distinction seems to be, that the owner of
 “property may, on alienation, qualify the interest of his alienee,
 “by a condition to take effect on bankruptcy; but cannot, by
 “contract or otherwise, qualify his own interest by a like

(f) *Montefiore v. Guldalla*, [1901] 1 Ch. 435.

(g) *Re Ashby*, [1892] 1 Q.B. 872.

(h) (1856), 3 K. & J. 90.

(i) (1818), 1 Swans. 471, at p. 481.

"condition, determining or controlling it in the event of his own bankruptcy, to the disappointment or delay of his creditors; the *jus disponendi*, which for the first purpose is absolute, being, in the latter instance, subject to the disposition previously prescribed by law" (*i.e.* the disposition in favour of the trustee in bankruptcy).

It should here be pointed out that it is not only direct limitations of this character which are caught by this principle, but any attempt to obtain for the owner of the property an interest till he becomes bankrupt, and then to give it over will fail. A good example is *Ex p. Mackay* (k).

In this case, A sold a patent to B in consideration of royalties. At the same time B lent to A a sum of money, and it was agreed that B should retain one-half of the royalties as instalments for repayment. Furthermore, the contract provided that if A went bankrupt B was to be entitled to retain the other moiety as well:

Held, that this provision operated to give A an interest in his own property determinable till bankruptcy, and, consequently, in respect of that moiety was invalid as against a trustee in bankruptcy.

The decision in *Ex p. Mackay* was applied in the case of *Ex p. Jay* (l), which affords another example of the same kind of transaction falling within the principle enunciated.

A stipulation in a building agreement was inserted to the effect that if the builder became bankrupt during the building operations and before the grant of a lease, then all the building materials brought on to the land should pass to the landowner, the prospective lessor. JAMES, L.J. (at p. 25), said:

"It appears to me that it (this case) is governed by the decisions of this Court in *Ex p. Mackay* and *Ex p. Williams* (m), which only followed much older decisions. The principle of those decisions is this, that a simple stipulation that, upon a man's becoming bankrupt, that which was his property up to the date of the bankruptcy should go over to some one else and be taken away from his creditors is void as being a violation of the policy of the bankrupt law" (n).

(k) (1873), L.R. 8 Ch. 643.

(l) (1880), 14 Ch. D. 19.

(m) (1877), 7 Ch. D. 138.

(n) This decision is somewhat difficult to reconcile on the facts with the later case of *Ex p. Newitt* (1881), 16 Ch. D. 522, but it certainly stands for its general principle.

A somewhat different application of the principle behind the decision in *Ex p. Mackay* (*supra*) is to be found in *Re Johns* (o). Here, a son borrowed a sum of money on mortgage from his mother. The mortgage deed included a provision that if the son were to be adjudicated bankrupt during the mother's lifetime he should repay a larger sum than otherwise would be due on the mortgage. It was held by TOMLIN, J., that this larger sum could not be recovered in the bankruptcy, but the mortgage was security only for the smaller amount. The learned judge adopted the following passage from the judgment of MELLISH, L.J., in *Ex p. Mackay* (p): "As I understand it, a person cannot make it a part of his contract that, in the event of bankruptcy, he is then to get some additional advantage which prevents the property being distributed under the bankruptcy laws." The scheme of the transaction was designed to circumvent the bankruptcy laws.

Valuable Consideration Immaterial.—It will be observed that in both these last cases there was some consideration given for the interest taken in the event of determination on bankruptcy. It is well, therefore, to remember that the rule does not apply simply to voluntary settlements. No reference to this appears in any of the judgments in these cases, but this aspect of the matter received attention in *Mackintosh v. Pogose* (q), where STIRLING, J., expressed his view (at p. 514) in the following words:

"I think that the cases on marriage settlements show, and "*Whitmore v. Mason* (r) is an express authority, that the mere "existence of valuable consideration does not entitle the owner "of property to settle it on himself until bankruptcy" (s).

Settlement not Entirely Avoided.—Assuming that an interest subject to such determination is taken by the trustee in bankruptcy for the benefit of creditors, but is not exhausted in paying the debts, the gift over will then take effect in respect of the surplus. That is to say, the whole interest will pass from

(o) [1928] Ch. 737.

(p) (1873), L.R. 8 Ch. at p. 648.

(q) [1895] 1 Ch. 505.

(r) (1861), 2 J. & H. 204.

(s) In that case the rule was not applied, because there the husband settled what was practically the property of the wife. Furthermore, if the transaction amounts to a sale and not a settlement, the defeasance may be good (*Deny v. Warr*, [1919] 1 K.B. 583, and see *post*, p. 214).

the debtor, even although it is not entirely required to pay debts (t).

In *Re Johnson* (t) a limitation of the debtor's property to himself, defeasible on bankruptcy, was followed by a discretionary trust of which he himself was one of the beneficiaries. He went bankrupt, and his interest was taken by the trustee in bankruptcy. There was a surplus after payment of his debts, but the bankruptcy was not annulled. The surplus was therefore paid to the trustees, who held upon the discretionary trusts. The debtor went bankrupt again:

Held, the trustee in the second bankruptcy was not entitled to any interest under the settlement.

Whole Interest Vests in Trustee.—At the same time, the whole interest that the debtor had vests in the trustee in bankruptcy despite any other forfeiture clauses. Therefore, if the clause for forfeiture on bankruptcy shall also contain other causes of forfeiture as alienation, but the interest, if not so defeated, will remain in the debtor for life, then the trustee in bankruptcy may dispose of the whole life interest. If any such cause of forfeiture subsequently occur, this will not affect the rights of the transferee (u).

On the other hand, if one of the other causes of forfeiture, e.g. voluntary alienation, occurred before the commencement of the bankruptcy, the interest taking effect on such defeasance would have become vested, and therefore it will not divest in favour of the trustee in bankruptcy (a).

In *Re Detmold* (a) there was a clause for defeasance on involuntary alienation. A creditor obtained an order against the property in respect of his own debt appointing him equitable receiver. The debtor was later adjudicated bankrupt:

Held, that the property had already vested in the person entitled on defeasance for involuntary alienation, hence no interest vested in the trustee in bankruptcy.

(4) MODIFICATION OF CONTRACTUAL LIABILITIES BY BANKRUPTCY

Bankruptcy can affect existing contracts in various ways which may modify the rights under them. For example, an

(t) *Re Johnson*, [1904] 1 K B. 134.

(u) *Re Burroughs-Fowler*, [1916] 2 Ch. 251.

(a) *Re Detmold* (1889), 40 Ch. D. 585. An up-to-date example of this principle is *Re Balfour*, [1938] Ch. 928, where the forfeiture was caused by the trustees giving notice to retain income to recoup a breach of trust.

onerous contract may be disclaimed. The effect of disclaimer is the cessation of the liability of the trustee in bankruptcy liable under the contract, although it may give rise to other rights (*b*). It is not, therefore, all the modifications of a contract by bankruptcy which are referred to in this place, but only those cases in which the contractual rights and liabilities do not vest in the bankrupt's trustee, or in so doing are altered in character.

Executory Contracts.—Contracts vary so considerably that the decisions on the effect of bankruptcy are inevitably concerned largely with particular facts. A general principle is not easy to extract, but it is submitted that it would probably be a sound generalisation to say that

where a contract is executory on both sides, the solvent contracting party can refuse to perform his part of the contract unless he obtains sufficient guarantee that the other part will be performed in full.

For example, a foreman employed on a three years' contract would be entitled to refuse to continue his work without a reasonable prospect of being paid. The law is summarised by MELLISH, L.J., in *Re Sneezum* (*c*), thus:

“The mere fact of one of two parties to a contract becoming bankrupt did not of itself put an end to the contract. No doubt the person who had contracted with the bankrupt was not bound to deliver goods to a man who had become insolvent unless he got paid for them beforehand, and a man who had agreed to do work and labour for a bankrupt—a foreman, for instance, who had been engaged for three years—was not bound to go on serving him without the prospect of getting paid. He would be entitled to say, ‘I cannot go on unless I am secured my wages.’ But subject to that, the bankrupt’s contract continued, and the assignee (*i.e.* trustee in bankruptcy) was always entitled to perform it, and so long as he performed it he got the entire benefit of it.”

Sale of Goods.—The question has most frequently arisen out of contracts for the sale of goods. Here the law was laid down, after an examination of the authorities,

that a seller is not bound to go on delivering goods under a contract, even although he has agreed to allow credit, until the price of goods not yet delivered be tendered to him (*d*).

(b) See *post*, p. 251.

(c) (1876), 3 Ch. D. 463, at p. 473.

(d) *Ex p. Chalmers* (1873), 8 Ch. 280.

In *Ex p. Chalmers* (d) 330 tons of bleaching powder was to be delivered in instalments of 30 tons per month. Payment was to be made in cash, fourteen days after delivery. After delivery of some of the instalments, but before the completion of the contract, the purchaser became bankrupt:

Held, that the seller was entitled to refuse to deliver any further instalments, except against an immediate cash payment.

Contract Executed on One Side.—It must, however, be borne in mind that the principles just mentioned are in point only where the contract is executory on both sides. Where one party has fulfilled his obligation, it does not follow that he can insist upon complete performance by the other. This may be emphasised by reference to the recent case of *Re Wait* (e).

In this case the debtor had purchased a cargo of 1,000 tons of wheat being shipped to England on board the *Challenger*. Before the arrival of the ship he sub-sold to purchasers 500 tons of this wheat without expressly appropriating any specific part of the cargo. The purchasers paid to the debtor the whole price. The cargo was delivered to the debtor, who went bankrupt:

Held, that the purchasers had no right to 500 tons of the wheat which vested in the trustee in bankruptcy, and the purchasers were only entitled to prove for damages in the bankruptcy (f). ATKIN, L.J. (at p. 640), epitomised the law in these words:

“The nett result of this decision is that the buyer of goods
“in these circumstances is in no better position in bankruptcy
“than a seller. If a seller of goods delivers them to the buyer
“before payment, trusting to receive payment in due course,
“and the buyer becomes bankrupt, the seller is restricted to
“a proof, and can assert no beneficial interest in the goods.
“There seems no particular reason why a different principle
“should prevail where a buyer hands the price to the seller
“before delivery of the goods, trusting to receive delivery in
“due course. In both cases credit is given to the debtor, and
“the buyer and seller respectively take the well-known risk of
“the insolvency of their customer.”

(e) [1927] 1 Ch. 606.

(f) This decision has been much criticised on the ground that the property in the wheat vested in the purchasers at the date of the contract under the Sale of Goods Act, 1893, but assuming that the Court was correct on this point it forms an admirable instance of the point to be illustrated. Apart from agreement, the property in goods passes under a contract of sale when goods have been appropriated to the contract without waiting until delivery.

To understand the decision it is necessary to realise that the property (ownership) in the wheat did not pass under the contract of sale, but in this case delivery was necessary in order to transfer the ownership. Had delivery occurred before bankruptcy, of course, the contract would have been fully performed on both sides and so no question could arise (*g*). As delivery could not be effected till after the bankruptcy, the contract was not performed by the bankrupt. The purchasers, despite their performance, were not entitled to compel the debtor to complete the contract.

Stoppage in Transitu.—In connection with the effect of insolvency on the contract for the sale of goods, reference must be made to the right of stoppage *in transitu* (*h*).

'This is the right of an unpaid seller to retake goods which have already been dispatched to the purchaser, but are still in transit.

It really amounts to the exercise of an unpaid seller's lien (*i.e.* an equitable right to retain goods till payment, although the property has passed to the purchaser) after that right has, strictly speaking, been released, but before the goods have actually passed into the *de facto* possession of the purchaser.

It will be observed that the right to stoppage *in transitu* only exists where the purchaser is insolvent, but he need not have been adjudicated bankrupt (*i*). It should, perhaps, be also noticed that the right of stoppage *in transitu* will be defeated by a transfer to a *bona fide* purchaser without notice of a bill of lading of goods still in transit under the bill (*k*).

Executory Contracts Abandoned.—Where a contract is executory, the trustee in bankruptcy may, of course, abandon the contract without disclaiming it (*l*). If the trustee does so abandon it, the other party to the contract is then relieved from performance, and this is probably the ground upon which the foregoing principles are established, but abandonment may entitle the other party to damages for breach of contract or it may amount to a mutual intention to rescind (*m*). It will turn

(*g*) Subject to the rules of relation back, but in most cases this would have been a protected contract under s. 45.

(*h*) Codified in Sale of Goods Act, 1893, ss. 38, 44, 45, and 46. Only reference is made here; for details see works on the law of the contract.

(*i*) Sale of Goods Act, 1893, s. 44. (*k*) Sale of Goods Act, 1893, s. 25 (2).

(*l*) *Re Sneezum* (1876), 3 Ch. D. 463.

(*m*) *Re Phoenix Bessemer Steel Co* (1876), 4 Ch. D. 108, at pp. 114, 115.

upon the particular facts whether the intention was mutual or there was merely a refusal to perform the contract. If, however, the trustee in bankruptcy continues to perform his part of the contract he is entitled to receive on behalf of the estate the benefit of the other party's performance, unless he has made a new contract. This was clearly brought out in *Re Phoenix Bessemer Steel Co.* (m).

In this case there was a contract to erect a building. The contract provided that should the builder become insolvent, then the other party could determine the contract. The builder became insolvent, but the contract was not in fact determined. The trustee completed the contract out of his own resources, and claimed to receive part of the price:

Held, that the money was paid under the contract, and not under any new contract, and hence was held for the benefit of the creditors.

(5) CONTRACTS INVOLVING PERSONAL SKILL ON THE PART OF THE BANKRUPT

Benefit does not pass to Trustee.—The benefit of a contract for the personal service in the future of the bankrupt will not pass to the trustee in bankruptcy (n).

CRESSWELL, J. (m), put the law thus:

"I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees (*i.e.* trustees in bankruptcy); they cannot hire him out as was said by Lord MANSFIELD, and, as a consequence, the assignees cannot, after bankruptcy, adopt and enforce a contract made before the bankruptcy, for the application of the personal skill or labour of a bankrupt."

The same case is authority for the proposition that if a contract for personal service has been broken before the date of the bankruptcy, then the right of action passes to the trustee, because it has ceased to be a contract and become that species of property known as rights of action (o).

Breach by Other Party.—At the same time, if the bankrupt in fact does perform the contract, any claim for breach of contract arising from failure to comply with his obligations by the other party can be enforced by the trustee in bankruptcy (p).

(m) *Re Phoenix Bessemer Steel Co.* (1876), 4 Ch. D. 108, at pp. 114, 115.

(n) *Beckham v. Drake* (1849), 2 H L. Cas. 579. (nn) *Ibid.* at p. 615.

(o) See p. 189, *post*. (p) *Wadling v. Oliphant* (1875), 1 Q.B.D. 145.

In *Wadling v. Oliphant* (p) a bankrupt obtained employment as an editor. He subsequently obtained damages for wrongful dismissal:

Held, the damages passed to the trustee in bankruptcy, if he claimed them.

If, however, the trustee in bankruptcy does not intervene, the debtor can himself bring an action for breach of such contract occurring after bankruptcy, because the contract did not in the first place vest in the trustee (q).

New Contract.—Furthermore, until breach of the contract, the debtor can agree with the other contracting party to make a new and different contract (r).

In *Re Shine* (r) an actor, who had an agreement for employment at £30 a week, went bankrupt. After his adjudication he agreed with his employer that, if his employer undertook certain liabilities in respect of his property, the debtor was to receive only £10 a week:

Held, that the new contract was valid, and replaced the old (s).

What is Personal Service.—One of the principal difficulties in this connection arises from the fact that there is no real definition of a purely personal contract. The expression would appear to mean contracts which were intended to be performed only by the bankrupt himself personally as the person best fitted to perform them, that is, requiring an implied term that the continuance of the person was necessary for the continuance of the contract.

In *Re Worthington* (t), a debtor underwrote subscriptions to the share capital of a company. He died:

Held, that the contract was not purely personal, and the liability passed to his personal representatives. But EVE, J. (at p. 316), safeguarded himself from implying that no services of promotion of a company might be personal services.

A recent decision on the nature of purely personal contracts is *Re Collins* (u).

(p) *Wadling v. Oliphant* (1875), 1 Q.B.D., 145.

(q) *Bailey v. Thurston & Co.*, [1903] 1 K.B. 137.

(r) *Re Shine*, [1892] 1 Q.B. 522.

(s) The power of the Court to make an order respecting income (see *post*, p. 233) may possibly have affected the practice of this rule, where the remuneration is salary or income.

(t) [1914] 2 K.B. 299.

(u) [1925] Ch. 556.

In this case a surveyor went bankrupt having left unperformed certain large contracts. He carried on his business with the aid of a staff:

Held, that the contracts were not purely personal contracts, but formed part of carrying on a business, so that the trustee could carry it on, as he did, employing the bankrupt and part of the staff to do the work, and himself receive the payments due in respect of performance.

(6) STATUTORY EXCEPTIONS

The two principal exceptions contained in the Act other than those contained in s. 38 itself, are:

- (1) Section 50, which relates to the stipend derived from an ecclesiastical benefice. This being principally money accruing due after adjudication, it is left to be dealt with in connection with after-acquired property (*a*); and
- (2) Section 51, which is concerned with personal earnings of the debtor, which is on the same footing as s. 50 (*b*).

(7) CASES BASED ON PUBLIC POLICY

There are some cases which show that the policy of the bankruptcy law has leaned against passing certain rights in the nature of choses in action to a trustee in bankruptcy. These rights are principally rights of action affecting the mind or character of the debtor, sometimes referred to as personal actions.

Rights of Action The leading case on the point is *Beckham v. Drake* (*c*), already referred to (*d*), although in this case the right of action was held to pass to the trustee on the ground that it formed part of the property of the debtor. A right of action, as any other chose in action, is properly property, but if it relates solely to the person of the debtor, it has been deemed not to form part of his estate for the purposes of bankruptcy law. On the other hand, if the right of action would affect his estate it has been held to pass.

In *Beckham v. Drake* the debtor had agreed to serve for a period of seven years at a fixed wage, "the party making default

(*a*) See *post*, p. 232.

(*c*) (1849), 2 H.L. Cas. 579

(*b*) See *post*, p. 232.

(*d*) See p. 187.

to pay to the other the sum of £500 by way or in nature of specific damages." The debtor was dismissed and afterwards became bankrupt:

Held, the right to sue on the contract passed to the trustee in bankruptcy.

ERLE, J. (at p. 604), stated the principle underlying this branch of the law as follows:

"The right of action does not pass where the damages are 'to be estimated by immediate reference to pain felt by the 'bankrupt in respect of his body, mind, or character, and 'without immediate reference to his rights of property. Thus, 'it has been laid down that the assignees cannot sue for breach 'of promise of marriage, for criminal conversation, seduction, 'defamation, battery, injury to the person by negligence, as 'by not carrying safely, not curing, not saving from imprisonment by process of law."

Actions Personal to Bankrupt.—The distinctions between rights of action that do and do not pass was neatly raised in the case of *Wilson v. United Counties Bank* (e), where it was held that if a wrong included a breach of contract affecting the estate and a purely personal wrong, the trustee was entitled to that part of the damages applicable to the estate, while the other damages belonged to the debtor personally.

In that case, the debtor before going on military service had entered into a contract with the bank that the local manager should as far as possible safeguard his business and credit. Through the negligence of the bank manager the debtor became insolvent. The debtor and his trustee brought an action to recover damages

(a) for breach of contract to protect his business interests; and

(b) injury to the bankrupt's credit and reputation:

Held, that damages payable under the first head passed to the trustee in bankruptcy, and under the second head to the debtor personally.

Where the right of action does vest in the trustee in bankruptcy, the debtor cannot bring any proceedings himself, even if he alleges fraud on the part of the petitioning creditor, except that he may apply to the Bankruptcy Court to set aside the proceedings (f). On the other hand, the trustee in bankruptcy

(e) [1920] A.C. 120.

(f) *Bowler v. Power*, [1910] 2 K.B. 229.

can assign a right of action that vests in him, even though it may have been unassignable by the debtor on the ground, for example, that such assignment would be champertous (*g*).

In *Guy v. Churchill* (*h*), the trustee assigned a right of action on the terms that the assignee, who was, however, one of the creditors, was to be solely responsible for the cost of the proceedings, but if he recovered anything, then the trustee was to have one-fourth of the amount recovered:

Held, that this was a valid assignment. CHITTY, J. (at p. 489), said:

"I have cited sufficient authority to show that champerty 'is but a form of maintenance, though it be maintenance aggravated by an agreement to have part of the thing in dispute. Both maintenance and champerty are founded on the same principle or policy of law, viz. the tendency of the transactions to defeat the course of justice. But adopting the principle of the decision in *Seear v. Lawson*, I do not think I am carrying it beyond its true limits in holding that 'it covers the case before me. . . .'"

Probably the maintenance must be of one of the creditors of the debtor, unless perhaps it is the out-and-out sale of a right of action, which, as was pointed out in *Seear v. Lawson* (*g*), might involve the trustee in greater risks than he would care to take so that he had best realise it by sale.

Equitable Choses in Action.—Some reference under this head should, perhaps, be made to *equitable choses in action*. It is, of course, necessary ordinarily to give notice to complete a title to an equitable chose in action under the rule in *Dearle v. Hall* (*hh*). This necessity appears still to apply as against assignees for value (*i*), and, in the same way, a title may be obtained as against a prior assignee of an equitable chose in action by the trustee who first gives the requisite notice (*k*).

These decisions proceed upon the principle that an assignee for value and a trustee in bankruptcy are upon the same footing and that, therefore, the general law applies. It will be borne in mind that these rules now apply equally to equitable interest in land (*l*).

Where, however, the question of priority arises as between

(*g*) *Seear v. Lawson* (1880), 15 Ch. D. 426.

(*h*) (1888), 40 Ch. D. 481.

(*hh*) (1828), 3 Russ. 1

(*i*) *Palmer v. Locke* (1881), 18 Ch. D. 381.

(*k*) *Re Beall*, [1899] 1 Q.B. 688.

(*l*) Law of Property Act, 1925, s. 137 (1).

two trustees in bankruptcy, the principle does not apply. The question can only arise in the case of foreign bankruptcies, because on a second bankruptcy all property vests in the trustee in the second bankruptcy. In a foreign bankruptcy, where an English bankruptcy subsequently supervenes, all choses in action, which would have vested in the trustee in the first bankruptcy, will not be divested in the trustee in the English bankruptcy, even if he is the first to give notice (*m*).

In this case there was a New Zealand bankruptcy followed by an English bankruptcy. A certain reversionary interest had been overlooked in the New Zealand bankruptcy, and the English trustee was the first to give notice:

Held, that the reversionary interest had vested in the New Zealand trustee, and the fact that he had been first to give notice conferred no priority on the English trustee. PHILLIMORE, J. (at p. 903), said:

"Another point urged by Mr. Hansell was that the English trustee was the first to perfect his title by giving notice to the trustees of this property of the statutory assignment to him of the bankrupt's equitable conversion. I think, however, the answer to that is conclusive, and is indicated in and supported by *Re Wallis* (*n*). The trustee in bankruptcy only takes what the bankrupt has to give him. If the bankrupt has encumbered his estate he takes it subject to equities. If the bankrupt has passed away a portion of his estate, he only gets the rest; if he has passed it all away, he gets none."

(8) THIRD PARTIES UNDER INSURANCE

Another statutory interference with the rights of parties is made by the Third Parties (Rights against Insurers) Act, 1930. Under this statute (s. 1) wherever any person is insured against a liability to a third party, and goes bankrupt, or makes a composition with his creditors, or on his death an order is made under the Bankruptcy Act, s. 130, then, if any liability is incurred either before or after either of the events mentioned, the rights of the insured shall vest in the third party. This operates only to vest a right in respect of the precise liability

(*m*) *Re Anderson*, [1911] 1 K.B. 896.

(*n*) [1902] 1 K.B. 719. In this case it was held that an equitable mortgagee by deposit of a policy of assurance was protected against a trustee who was the first to give notice on the ground that the trustee took subject to all existing equities.

to the third party, and no further amount against which the insured may be protected (s. 1 (4)). It is impossible to contract out of this Act.

Under s. 11 of the Road Traffic Act, 1934, it expressly provides against the claims of third parties under insurances effected under the Road Traffic Act, 1930, from vesting in any way in the trustee in bankruptcy.

It may be added that there are other more specialised statutes, which prevent rights from vesting in the trustee in bankruptcy, such as the Pensions Act, 1925.

CHAPTER 8

PROPERTY NOT VESTED IN THE BANKRUPT AT ADJUDICATION

CERTAIN property, which is not vested in the bankrupt at adjudication, may pass to the trustee in bankruptcy, although it does not fall within the doctrine of relation back.

This property may be of three classes:

- (1) That which the bankrupt does not and never has owned, but is treated as owning for the purposes of bankruptcy under what is known as the "reputed ownership" clause;
- (2) Property which the bankrupt has owned, but has parted with through a transaction which can be set aside, *e.g.* a voidable settlement; and
- (3) Property which the bankrupt acquires after adjudication;
- (4) *Perhaps*, claims under incomplete executions, which have been dealt with earlier (a).

Quite naturally different rules govern each branch of this subject, and consequently they must be treated separately.

1. REPUTED OWNERSHIP OF DEBTOR

Bankruptcy Act, s. 38 (c), provides that the following property shall vest in the trustee, *viz.*:

All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

This provision has been litigated probably more than any other in the Act and it is possible only to deal with the principal points.

Object of Section.—The object of the section, which originated in the Bankruptcy Act of 21 Jac. 1, c. 19, is to

(a) See *ante*, p. 151.

prevent persons enlarging their credit by an apparent show of substance which is not in fact theirs. As VAUGHAN WILLIAMS, J., put it, in *Re Watson & Co.* (b):

"It (the doctrine of reputed ownership) has been couched in various words in the successive bankruptcy statutes, but this principle has run through them all, and the statement of Lord REDESDALE in *Joy v. Campbell* (c) (a case which has been approved and acted on again and again) (d) and many other cases, that the true owner must have unconscientiously permitted the goods to remain in the order and disposition of the bankrupt justifies this statement. This does not mean, as we understand it, that he must have intended that false credit should be obtained by the bankrupt's apparent possession of the goods, but it does at least mean that the true owner of the goods must have consented to a state of things from which he must have known, if he had considered the matter, that the inference of ownership by the bankrupt must (observe, not might, or might not) (e) arise (f).

What are Goods.—This section will apply only to goods, but not to things in action, except debts due or growing due to the bankrupt in the course of his trade or business. This excludes all land or things attached to land which are fixtures, because the section relates only to chattels personal (g). What amounts to a fixture is a question of fact in each case, but it must be more than some mere annexation to the freehold, which does not in any sense form part of it (h).

In *Horwich v. Symond* (h) certain articles in a chemist's shop used in his business, as, for example, a show case and shelf, were attached to the floor or wall by nails:

Held, that they were goods within the meaning of this section.

Commencement of Bankruptcy.—Upon the inference of the ownership of goods within this section the debtor may have incurred credit which may have contributed to his bank-

(b) [1904] 2 K.B. 753, at p. 757:

(c) (1804) 1 Sch. & Lef. 328, at p. 336.

(d) See *Belcher v. Bellamy* (1848), 2 Ex. 303; *Hamilton v. Bell* (1854), 10 Ex. 545.

(e) See this applied in *Re Kaufman*, [1923] 2 Ch. 89 (see p. 202).

(f) See *Hamilton v. Bell* (*supra*); *Gibson v. Bray* (1817), 8 Taunt. 76; *Ex p. Bright* (1879), 10 Ch. D. 566.

(g) B.A. s. 167.

(h) *Horwich v. Symond* (1915), 84 L.J.K.B. 1083.

ruptcy. Consequently the property is to be divided among his creditors. At the same time the Act is limited to goods in his possession at the commencement of the bankruptcy, though "commencement" has the technical meaning within the doctrine of relation back (i).

Trade or Business.—Furthermore, since the whole rule turns upon preventing creditors being deceived by apparent assets, the rule is confined to goods in the order and disposition of the bankrupt in the way of his *trade or business* (ii).

What constitutes possession in the way of trade or business must be a question of fact. It will include all things which form part of his general trade or business, not merely things "visibly employed in his trade or business, but acquired for the purposes of the business and used for those purposes" (k).

In *Sharman v. Mason* (l), a mantle-maker had in her shop certain stands for showing off the mantles. These stands were borrowed, and she could not sell them:

Held, that she had them in the way of her trade or business.

Goods not usually Employed in Business.—It would seem that it is possible to have goods not usually employed in the business in such circumstances that the debtor may be reputed owner, but much stricter proof will be required (m).

In *Ex p. Lovering* (n) woollen manufacturers had certain pictures at their offices, and the senior partner showed the pictures to certain customers, and spoke of them as owner. He even tried to sell one:

Held, that the evidence was insufficient to show that they were treated in such a manner as to be in the possession of the firm in the way of their trade or business, but formed part of the senior partner's own property.

The question of trade or business has been the subject of four recent decisions. In *Lamb v. Wright & Co.* (n), it was laid down that occasional use in the business where an article was primarily employed for domestic purposes would not

(i) See *ante*, p. 131.

(ii) See *Re Wallis* (1885), 14 Q.B.D. 950.

(k) LINDLEY, L.J., in *Colonial Bank v. Whinney* (1885), 30 Ch. D. 261, at p. 281. In *Lamb v. Wright & Co.* (*infra*), McCARDIE, J., at p. 866, seems to interpret the words "acquired for the purposes of the business" as restrictive, but it is respectfully submitted that on the whole facts and decision of the case LINDLEY, L.J., meant them to be more comprehensive than visibly employed.

(l) [1899] 2 Q.B. 679.

(m) *Ex p. Lovering* (1883), 24 Ch. D. 31.

(n) [1924] 1 K.B. 857.

constitute "order and disposition" in the way of his trade or business, if the debtor had acquired it for that purpose.

In *Lamb v. Wright & Co* (*supra*) the debtor obtained on the hire-purchase system a motor car, specifically for private use. He occasionally used it in his business:

Held, that it was acquired for the purpose of his domestic life and was not in his order and disposition in his trade or business (*o*).

In *Re Wethered* (*p*), it was held that a debt due under a judgment was equally in the order and disposition of a debtor in his trade or business as if the debt had remained a simple contract debt.

In *Blakey v. Pendlebury Trustees* (*q*), it was held that unpaid instalments under a hire-purchase agreement were "debts . . . growing due" within the meaning of the Bankruptcy Act, s. 38 (*c*), and passed to a trustee in bankruptcy, notwithstanding that the debtor had assigned all his rights to a third party, because notice of the assignment had not been given to the person who was taking the goods under the hire-purchase agreement.

Again, in *Latham v. Goldsbury* (*r*), it was held that "debts growing due" included deposits made by a publican with the brewers who supplied him for the purpose of meeting the debts due from him to them.

It will be borne in mind that debts due or growing due in the course of business are the only choses in action which are within the section, thus shares are things in action not capable of passing under the section (*s*).

Where such debts exist an assignee of the debts in order to take them out of the order and disposition of the bankrupt should, before the commencement of the bankruptcy, give notice to the individual debtors; and it has been suggested that nothing less will really suffice (*t*).

What is Possession by the Debtor. The possession of the bankrupt must exist at the date of the commencement of

(*o*) As will be seen, the consent of the true owner is necessary to such possession, and here it was held that in these facts the true owner could not have consented.

(*p*) [1926] Ch. 167.

(*q*) [1931] 2 Ch. 255.

(*r*) [1933] 1 K.B. 844.

(*s*) *Colomal Bank v. Whinney* (1886), 11 App. Cas. 426.

(*t*) *Re Neal*, [1914] 2 K.B. 910. The judgment in this case goes rather further than *Rutter v. Everett*, [1895] 2 Ch. 872, and is not quite consistent with that case, the matter is therefore somewhat in doubt.

the bankruptcy, but need not be more than constructive possession, *e.g.* the possession of an agent will suffice (*u*).

In *Ex p. Roy (u)* a horse-dealer sent to a customer an unsatisfactory pair of horses. She returned the horses and asked for a return of the purchase price. The dealer sent another, no more satisfactory pair, and told her to retain the pair till he could furnish her with better. In the meantime he went bankrupt:

Held, that the horses were in his possession in the way of his trade or business and passed to his trustee.

Possession under Bill of Sale.—It is immaterial that the debtor simply has possession under a bill of sale given as security for the repayment of a loan under the Bills of Sale Act, 1882, because they remain in his possession (*a*).

In *Re Ginger (a)* a dairy farmer executed a bill of sale in favour of his bank on his cows, horses, and other stock, and furniture as security for payment on a day fixed. Before that day the farmer was adjudicated bankrupt without committing any act before the commencement of the bankruptcy, which would have entitled the bank to enter into possession under the bill of sale:

Held, that, nevertheless, the debtor had the property in his order and disposition for the purposes of the Bankruptcy Act. VAUGHAN WILLIAMS, J. (at p. 466), said:

"It seems to me that, although the Bills of Sale Act compels "the grantee to allow the grantor to remain in possession of "the goods, it does not in any sense compel him to consent to "a false reputation of ownership. If the surrounding circumstances are not such as to raise a reputation of ownership on "the part of the grantor of the bill of sale, then the enforced "consent by the grantee to the possession of the goods does no "harm, and the reputed ownership clause does not apply. "But if the surrounding circumstances are such as to raise the "reputation of ownership on the part of the grantor, then the "grantee must go further, and take such steps as are necessary "to negative the reputation of ownership" (*b*).

Absolute bills of sale registered under the Bills of Sale Act, 1878, do not come within the reputed ownership provisions, owing to s. 20 of that Act, nor do security bills made between 1878 and the coming into force of the Bills of Sale Act, 1882 (*c*).

(*u*) *Ex p. Roy* (1877), 7 Ch. D. 70. (*a*) *Re Ginger*, (1897) 2 Q.B. 461.

(*b*) This case was approved in *Hollinshead v. Egan*, [1913] A.C. 564.

(*c*) *Swift v. Pannell* (1883), 24 Ch. D. 210.

An absolute bill of sale transfers the ownership of the chattels without transferring the immediate possession. The provisions of the Bills of Sale Act, 1878, are stringent, and it is not commonly met with in practice, especially with regard to chattels associated with a trade or business.

Sole Possession.—The possession of the debtor must be sole possession. Consequently, if property is possessed jointly or in common, but only one of the possessors becomes bankrupt, the reputed ownership clause does not apply (*d*).

B was partner with another. B alone became bankrupt:

Held, that property possessed by the firm was not in the reputed ownership of B even as to one-half, because they hold *per mie et per tout*, and consequently neither one nor the other can be said to hold any aliquot share (*d*).

Determination of Possession before Bankruptcy. Since the possession must exist at the commencement of the bankruptcy, the fact that it has existed prior to the adjudication will not be effective to bring the case within these provisions, if before the commencement of the bankruptcy the possession has been determined. Furthermore, a demand for possession, which is made *bona fide*, will be sufficient, although the true owner fails actually to take possession through no fault of his own (*e*).

The owner of certain whisky, which had remained in bond, wrote to his vendor to forward a hogshead. The vendor had warehoused the whisky elsewhere, and, before it was forwarded, had become bankrupt:

Held, that the demand for the whisky had determined the possession for the purposes of the clause (*e*).

Again, a receiver may take possession for the true owner and so determine the possession of the debtor (*f*).

When the property is in the nature of a chose in action as a trade debt, then the possession will be determined by giving notice to the debtor of the bankrupt (*g*).

Re Seaman (*g*) was a case in which an assignment was made of a War Office contract:

Held, that notice to the War Office of the assignment determined the possession of the assignor.

(*d*) *Re Bainbridge* (1878), 8 Ch. D. 218.

(*e*) *Ex. p. Ward* (1872), 8 Ch. 144.

(*f*) *Taylor v. Eckersley* (1877), 5 Ch. D. 740.

(*g*) *Re Seaman*, [1896] 1 Q.B. 412.

Taking possession of part of the property will be sufficient to determine the possession of the whole, provided that that was intended (*h*).

The property in *Re Eslick* (*h*) was in two separate places. The true owner took possession of that in the first place, but received notice that a petition had been filed before he could take possession of the other:

Held, that the possession in respect of all was determined (*i*).

Possession without Notice of an Act of Bankruptcy.—Lastly, it may be said in this respect that, although the important date is the commencement of the bankruptcy, yet if possession is taken without notice, but after commission, of an act of bankruptcy, this has been held to be a protected transaction under the section re-enacted by Bankruptcy Act, s. 45 (*k*). The law in this respect was laid down by MAULE, J., in *Graham v. Furber* (*k*) (at p. 156), where he says:

“It was the intention of the legislature by this statute to “relieve such a person and to place him in as good a position, “where he got back his goods before notice of an act of bankruptcy. When he got his goods back they were taken to have “been got back before an act of bankruptcy, if got back without “notice of an act of bankruptcy.”

In *Herbert's Trustee v. Higgins* (*l*), a mere threat to file a bankruptcy petition was held *not* to be notice of an act of bankruptcy.

The retaking may be friendly provided the true owner does *bona fide* get possession (*m*).

What will Constitute a Reputation of Ownership.

—It is only where the goods are in the possession of the bankrupt with a reputation of ownership that they will pass to the trustee.

“The doctrine of reputed ownership does not require any “investigation into the actual state of knowledge or belief, “either of all creditors, or of particular creditors, and still less “of the outside world, who are no creditors at all, as to the “position of particular goods. It is enough for the doctrine “if those goods are in such a position as to convey to the minds

(*h*) *Re Eslick, Ex p. Phillips* (1876), 4 Ch. D. 496.

(*i*) This case seems to turn principally upon the consent of the true owner to the possession of the debtor (see *post*, p. 203).

(*k*) See *ante*, p. 135 *Graham v. Furber* (1853), 14 C.B. 134

(*l*) [1926] Ch. 794

(*m*) *Re National Guardian Assce. Co.* (1878), 10 Ch. D. 408.

"of those who know their situation the reputation of ownership, "that reputation arising by the legitimate exercise of reason "and judgment in the knowledge of those facts which are "capable of being generally known to those who choose to "make inquiry on the subject. It is not at all necessary to "examine into the degree of actual knowledge which is possessed "but the Court must judge from the situation of the goods what "inference as to the ownership might be legitimately drawn "by those who knew the facts. I do not mean the facts that "are only known to the parties dealing with the goods, but such "facts as are capable of being, and naturally would be, the "subject of general knowledge to those who take any means "to inform themselves on the subject. So, on the other hand, "it is not at all necessary, in order to exclude the doctrine of "reputed ownership, to show that every creditor, or any "particular creditor, or the outside world who are not creditors, "knew anything whatever about particular goods, one way or "the other. It is quite enough, in my judgment, if the situation "of the goods was such as to exclude all legitimate ground from "which those who knew anything about that situation could "infer the ownership to be in the person having actual possession" (n).

In *Ex p. Watkins* (n) certain butts of whisky were in the bonded warehouse of the debtors, who were wine and spirit merchants, though they had been sold. The butts of whisky had been left there for the convenience of the purchaser. By a custom well known to wine and spirit merchants in Liverpool, the situation of the warehouse, which had been sold, did remain in "the possession" and under the control of the vendors:

Held, that the trade custom excluded the reputation of ownership.

It will be seen that *Ex p. Watkins* is not only an authority stating the general principles of reputation of ownership, but also the leading case on the nature of the exception, if it can be so called, that a trade usage will exclude the doctrine. It is not accurate to call it an exception, because it is really derived from the principle. There cannot properly be a reputation for ownership where it is well known that the possessor may not be the owner. As MELLISH, L.J., put it in *Ex p. Vaux* (o):

(n) Per SPIBOURNE, L.C., in *Ex p. Watkins* (1873). 8 Ch. 520, at p. 528. Adopted by House of Lords in *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426.

(o) (1874) 9 Ch. 602, at p. 706.

"The principle laid down in *Ex p. Watkins* was, that in "determining whether, where goods sold remain in the possession of the vendor up to the time of his bankruptcy, the vendor is the reputed owner of them, the Court must have regard to the custom of the particular trade, and if there was a well-established custom that goods when sold should remain in the possession of the vendor it prevents the mere fact of their continuing in his possession from giving the reputation of ownership."

It must not be thought that a reputation of ownership necessarily arises where there is possession and no trade custom to prevent such a reputation. Since it depends on all the circumstances of the case, any fact that would give an opportunity of holding another view must be considered.

In *Ex p. Bright (p)* goods were consigned by the owners to a firm, not as purchasers, but as agents, to sell. The agents described themselves as "merchants and manufacturer's agents." In fact, they acted as agents for other manufacturers:

Held, that by their own description there was sufficient to warn creditors that they might not be owners of goods possessed by them.

Trade Custom Excludes Reputation.—Whether there is a trade custom so notorious that it will prevent the doctrine of reputed ownership from applying is a question of fact, so far as any custom not already judicially noticed is concerned (*q*).

"The custom, however, must be well proved and shown to be known not only to persons in the same trade, but to others who were likely to be creditors" (*r*).

It is impossible to give anything in the nature of a list of such customs as have been recognised, but it may be useful to observe that the Court has declined to accept proof of a custom to hire furniture by private persons so as to exclude the doctrine of reputed ownership (*s*), and has also refused to accept proof of a custom to obtain pianos on the hire-purchase system (*t*).

On the other hand, the custom of hiring hotel furniture

(*p*) (1879), 10 Ch. D. 566.

(*q*) *Ex p. Powell* (1875), 1 Ch. D. 501, at p. 506.

(*r*) *Per* MELLISH, L.J., in *Re Hill* (1875), 1 Ch. D., at p. 504 (n).

(*s*) *Re Kaufman*, [1923] 2 Ch. 89.

(*t*) *Chappell v. Harrison* (1910), 103 L.T. 594. For a list of such customs, see Williams' Bankruptcy (15th Ed.), pp. 293.

has been accepted as excluding the doctrine (u), and this case is also important as an authority for the proposition that, where such a custom does exist, it will exclude the possibility of any reputation of ownership even in goods which have not been acquired in the course of such custom.

For example, where the custom is to hire furniture, if, in fact, the furniture was bought, but mortgaged by a bill of sale, it would not pass under the doctrine of reputed ownership.

"The custom must, I think, as proved, be taken *prima facie* to apply to all furnishings of an hotel, of whatever kind. That being so, the effect of the custom is to give notice to all those who know it, or to whom the knowledge of it ought to be imputed, that the furniture of an hotel is not presumptively the property of the person who is occupying the hotel and carrying on the business—it may or may not be so. A man who knows so much as that has no right to say that there is a reputation of ownership by the hotel-keeper of the tables and chairs and other articles of furniture in the hotel if they do not happen in point of fact to be hired, while there is no such reputation as to those articles which are hired. The reputation does not apply to the particular articles at all, one way or the other. Where there is such a known custom as to exclude the general application of the law of the reputed ownership, any one who gives credit to the trader upon the assumption that some of the articles in his possession belong to him does so . . . at his own risk" (a).

Under the Agricultural Credits Act, 1928 s. 8 (4), farming stock, which is subject to an agricultural charge created under the Act, is not within the order and disposition section.

With the Consent of the True Owner.—The requirement of consent of the true owner involves two essentials. First, there must be consent, but secondly the consent can be given only by the person who is deemed to be true owner for this purpose. This second question is largely a problem of general property law and illustration must suffice. Generally, it may be said that the true owner is the person who at law is owner at the date of bankruptcy.

(u) *Ex p. Turquand* (1885), 14 Q.B.D. 636.

(a) *Per SLLBOURNE, L.C.*, in *Ex p. Turquand* (1885), 14 Q.B.D., at p. 643 applied in *Re Ford, Ex p. Powell's Trustee*, [1929] 1 Ch. 137.

In *Re Weibking* (b) a building agreement contained a clause that all building material brought on to the land in the course of the building passed to the freeholder. The builder became bankrupt during the building operations:

Held, that all loose (c) building material on the land was owned by the freeholder, and was in the order and disposition of the builder with his consent, and so passed to the trustee in bankruptcy (d).

Consent by Trustees.—Where the property is vested in trustees the normal rule is that the trustees are the true owners, but, where they have not executed the trust instrument and have never acted, the *cestuis que trust* will be the true owners, and their consent is necessary (e).

In *Re Mills* (e) a husband executed a settlement in favour of his wife and children. The trustees had not executed the instrument and had never acted. Two of the *cestuis que trust* were infants:

Held, that the *cestuis que trust* were the true owners, and, since infants could not consent, the doctrine of reputed ownership could not apply.

Similarly, if the trust was created by wrong, and the trustees became bankrupt, the true owners would be the *cestuis que trust*, and consequently there would be no consent (f); and since the true owner and the possessor must be different persons, if a trustee has trust property in his disposition, it will not pass (g). If a trustee permits the *cestuis que trust* to have the trust property, otherwise than in accordance with a direction in the trust instrument, their possession will fall under the doctrine (h).

What amounts to Consent.—In order that there may be a sufficient consent there must be knowledge of the circumstances of the debtor's possession, since consent implies knowledge (i). Furthermore, the consent must be to a possession that might give rise to a reputation of ownership.

(b) [1902] 1 K.B. 713.

(c) The material built into the house became part of the freehold and so was not "goods" within the section.

(d) Whether the consent would, in the light of other cases, be sufficient to support a reputation of ownership does not seem to have been considered, but in view of *Re Keen*, [1902] 1 K.B. 555, this is doubted.

(e) *Re Mills*, [1895] 2 Ch. 564.

(f) *G.E.R. v. Turner* (1872), 8 Ch. 149.

(g) *Joy v. Campbell* (1804), 1 Sch. & Lef. 328.

(h) *Caffrey v. Darby* (1801), 6 Ves. 488.

(i) *Ex p. Ford* (1876), 1 Ch. D. 521.

In *Lamb v. Wright & Co.* (k) consent to the debtor using a car as a private car was not sufficient to amount to consent to using a car in his trade or business, and so the doctrine was excluded. How far this principle may be applied is somewhat doubtful.

In *Re Keen* (l) a building contract contained a clause that building material brought on the land became the property of the persons employing the builder if he failed to go on with the work. He did so fail and became bankrupt:

Held, that there was no consent to a possession by the builder sufficient to support a reputation of ownership. WRIGHT, J. (at p. 560), said:

"I think that no inference of any such consent can properly be drawn. The builders were, under the agreement, entitled to be in the position of owners of the goods so long as the building went on, for the purpose of using them in the building, and the consent did not go beyond that. They (employers) merely consented that the goods should remain on the land for the very purpose for which they were placed there" (m).

The consent, like the possession, must be continued up to the date of the bankruptcy, and even after, if it is determined without notice of an act of bankruptcy (n).

Determination of Rights of Third Parties.—It may be convenient here to point out that questions involving reputed ownership may often affect the rights of persons not parties to the bankruptcy proceedings.

In practice, these questions will be decided by the Court having bankruptcy jurisdiction, since, under s. 105, such Court has jurisdiction to determine all questions which it may deem expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of the debtor's property (o). The Court, moreover, has power under s. 9 (1) to stay any proceedings that may be taken in any other Court respecting such matter, as in *Ex p. Cohen* (p), where proceedings concerning the validity of a bill of sale were stayed.

(k) [1924] 1 K.B. 857.

(l) [1902] 1 K.B. 555.

(m) The reasoning of this decision is not easy to follow, because it does not appear to be material to consider the purpose for which the owners permitted the debtors to have the building materials, so long as the owners consented to their possession in the way of their trade or business.

(n) *Ex p. Ward* (1872), 8 Ch. 144 (see *ante*, p. 199).

(o) See *ante*, p. 38.

(p) (1871), L.R. 7 Ch. 20.

If no stay is ordered, however, it would appear that such proceedings could properly be brought elsewhere (q).

Owner Entitled to Prove in Bankruptcy.—Lastly, it should be said that if the true owner loses his property under this clause he will be entitled to prove in the bankruptcy for the value of the property so lost (r). The ground for this decision was stated by BUCKLEY, L. J. (rr), as follows:

“At the date of the bankruptcy the debtor was under such obligations as resulted from the contract of bailment. It is true that down to the moment of the presentation of his petition no right of action had arisen, but there was, as it seems to me, in the bankruptcy proceedings a breach by reason of the bankrupt’s suffering an act which prevented him from fulfilling his contract. . . . Being under the obligation above stated, a state of things ensued by virtue of which the true owner was dispossessed of his goods and the debtor became incapable of performing the contract of bailment. It seems to me that there thus arose a liability by reason of the obligation under which the debtor lay at the date of the receiving order.”

2. TRANSACTIONS VOIDABLE BY THE TRUSTEE IN BANKRUPTCY

Apart from those transactions which are *void* in the event of the bankruptcy of the grantor, because they fall within the doctrine of relation back (see Chap. 6), certain other transactions may be set aside at the instance of the trustee. These transactions are only voidable and consequently remain effective unless and until the trustee takes steps to render them void. Furthermore, they are not necessarily wholly void, but may be effective in favour of some of the parties taking under them.

The difference between voidable and void transactions can be briefly illustrated by contrasting two cases appearing elsewhere in the book. In *Re Hart* (s) a daughter received a gift of shares from her father, treated as a settlement for the purposes of the Act, and after his bankruptcy but before adjudica-

(q) *Revell v. Blake* (1873), 8 C.P. 533.

(r) *Re Button*, [1907] 2 K.B. 180.

(rr) *Ibid.* at p. 190.

(s) [1912] 3 K.B. 6.

tion, she transferred the shares for value. The Court of Appeal held that the transferee took a good title, since the transaction could not have been avoided by the trustee until after adjudication. Here the settlement was only voidable under the Act, but in *Re Gunshourg* (t) it was fraudulent and void as an act of bankruptcy. A *bona fide* purchaser, from the transferee under the settlement, took no interest after adjudication, because the settlement was deemed to be void from the date of its execution by virtue of the doctrine of relation back.

The following cases are voidable:

- (1) Fraudulent preference under Bankruptcy Act, s. 44 (u).
- (2) A conveyance in fraud of creditors, Law of Property Act, 1925, s. 172.
- (3) A settlement voidable under Bankruptcy Act, s. 42.
- (4) Assignment of book debts under Bankruptcy Act, s. 43.

CONVEYANCE IN FRAUD OF CREDITORS

A conveyance in fraud of creditors has already received attention in connection with acts of bankruptcy (a). As has been pointed out, s. 172 of the Law of Property Act enacts in a modern form the old statute 13 Eliz., c. 5, upon which there have been many decisions, but it is often difficult to decide whether they approach the questions involved merely from the point of view of what constitutes fraud necessary to make them voidable, or from the aspect of the effect on the persons taking under the conveyance.

When it is Voidable.—In this place it is only necessary to emphasise that a conveyance falling within this provision may be voidable no matter how long before the bankruptcy it was executed. If it is an available act of bankruptcy (b) within the doctrine of relation back it is void (c). If it is not an available act of bankruptcy it will be voidable only against those parties who have not given either *valuable* consideration in good faith or *good* consideration in good faith. If a party has notice of the intent to defraud creditors, he does not act in good faith (s. 172).

(t) [1920] 2 K.B. 426.

(a) *Ante*, p. 50.

(c) *Re Gunshourg*, *supra*.

(u) *Ante*, p. 57.

(b) *Ante*, p. 133.

It will be observed that good faith on the part of the grantee alone will not be sufficient to protect him without either valuable or good consideration. It was held in *Ex p. Games* (d) that a past debt, which is not valuable consideration in the law of contract, was a perfectly good consideration to support the interest granted to the creditor. This case may be the reason for the expression "good consideration" in s. 172, which is new on this point. Good consideration has a more extended meaning in the ordinary law of conveyancing to include "natural love and affection" in a post-nuptial settlement, for example.

Notice of Intent to Defraud.—The subject of the necessary intent constituting an intent to defraud has been discussed earlier. Notice of intent to defraud on the part of a grantee has been much litigated and is not easy.

In *Re Fasey* (e) a debtor sold substantially the whole of his property to a company, in which the vendor was very largely interested, and so was able to stave off bankruptcy for more than three months from the sale. The sale included an agreement by the company to pay the vendor's business creditors, and, in fact, one creditor obtained a benefit. It was held that the conveyance was wholly void as there was an intent to defeat the creditors of the vendor and that the company had notice.

In this case the Court of Appeal do not really appear to have considered the question of notice to the transferee, but the judge of first instance, whose judgment was affirmed, expressly said (at p. 9):

"Then it is further contended that no fraudulent intent on the part of the company has been shown and that such intent is essential in order to enable the Court to declare the agreement void under the statute. In my view that contention is unsound. What is required by the Act to be shown, where there is a conveyance for valuable consideration, is that the purchaser had notice or knowledge of the fraudulent intent. The case of *Re Johnson* (f) does not, in my opinion, support the view that you must show that the company actively took part in the fraudulent intent of the assignor."

In *Re Reis* (g) the debtor transferred certain property in pursuance of a covenant in his marriage settlement for the benefit of his wife and children. One question raised was

(d) (1879), 12 Ch. D. 314.

(e) [1923] 2 Ch. 1.

(f) (1881), 20 Ch. D. 389; aff. 51 L.J. Ch. 503.

(g) [1904] 2 K.B. 769.

whether this transfer was void under the statute 13 Eliz., c. 5, and it was held by the Court of Appeal that it was not. STIRLING, L.J. (at p. 783), laid down the principle as follows:

“As a general rule, a marriage settlement cannot be set aside “as a fraud on creditors of the husband unless evidence is “given that the wife was party to the fraud (*h*). It was said, “however, that the wife must be taken to have known the “terms of the settlement, and that these terms were, on the “face of them, in the language of the Lords Justices in *Ex p. ‘McBurnie’s Trustees* (*i*), ‘grossly out of proportion to the “‘station and circumstances of the husband,’ or ‘so extravagant “‘that they ought to awaken inquiry.’ I am unable to come “to that conclusion.”

A recent example of the problem is *Re Baker* (*k*). A bachelor settled *all* his property, which was reversionary, by way of discretionary trust in favour of himself, any wife he might marry, his issue and the persons who for the time being would be his next of kin on intestacy. At the date of settlement he was in debt for £100, but provided in the settlement for power to raise £150 without any consent, and a power of revocation with the consent of the trustees or a judge of the Chancery Division. He subsequently married and later became bankrupt. FARWELL, J., held that the settlement was not within s. 172 of the Law of Property Act, because in his view the power or revocation would vest in the trustee in bankruptcy, and a judge of the Chancery Division would hardly decline to authorise any revocation which could be regarded as in fraud of creditors. It would seem that the power of revocation was very material as the whole property was settled.

It will therefore be seen that the principle is largely dependent upon the circumstances of the case.

SETTLEMENTS VOIDABLE UNDER BANKRUPTCY ACT, S. 42

Two forms of Voidable Settlement.—Section 42 deals with two cases, which are treated differently. Sub-s. (1) is concerned with voluntary settlements, that is, settlements not made in consideration of marriage or in favour of a *bona fide* purchaser

(*h*) See *Kewan v. Crawford* (1877), 6 Ch. D. 29.

(*i*) (1852), 1 D.M. & G. 441.

(*k*) [1936] Ch. 61.

or incumbrancer for valuable consideration. Sub-s. (2) affects covenants to settle after-acquired property contained in settlements made in consideration of marriage, *i.e.* for valuable consideration, and not therefore within sub-s. (1).

Voluntary Settlements.—A voluntary settlement shall be voidable against the trustee in bankruptcy if made within *two* years of the bankruptcy. It will also be voidable if made within *ten* years of the bankruptcy, *unless* the parties claiming under it can prove that at the time of the settlement both

- (1) the settlor was able to pay all his debts without the aid of the property comprised in the settlement; *and*
- (2) the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof (1).

Property must Pass Immediately.—In order that a settlement may at all be protected under this section, that is to say, if it is made within ten years but while the debtor was solvent, it is necessary that it should have been completed by a transfer of the property to trustees or to the beneficiaries. For example, a mere covenant to settle, though it might be enforceable at Common Law, will not protect property not actually transferred from passing to the trustee in bankruptcy. It is, however, sufficient for the settlor to declare himself trustee of the property, since this will constitute a completely constituted trust and the beneficial interests will be protected. If the settlor retains any interest, such as a life interest in the settlement, this will pass to the trustee in bankruptcy, and in such circumstances a legal estate remaining vested in the settlor will pass to his trustee.

What is a Settlement ?—Section 42 (4) provides that the expression settlement shall, for the purposes of this section, include any conveyance or transfer of property. The nature of a settlement within that section has been several times litigated. As long as there is a transfer of property, though no trust is created, or successive interests given, there will be a settlement, but if it is a gift of property which is not intended to be retained in its present form but to be expended, it is doubtful whether it can be a settlement.

In *Re Tankard* (m), WRIGHT, J., laid down this principle:

(1) B A. s. 42 (1).

(m) [1899] 2 Q.B. 57, at p. 60. Subsequently approved in *Re Plummer*, [1900] 2 Q.B. 790.

"I conceive, though there seems to be no authority on the point, that neither the original alienee, nor the transferee from him, could be required to restore money which he has spent on property which he has aliened before the bankruptcy, and without notice of any act of bankruptcy (or, perhaps, without knowledge of insolvency). though the alienee is probably liable to account for any proceeds which remain in his hands at the time of the bankruptcy—at any rate, if the acquisition by him of those proceeds was an object of the gift to him so that the proceeds can properly be said to represent the gift."

This seems to imply that a mere gift of money would not come within the section, though it was expended in, *e.g.* the purchase of a house, unless the gift of the money was expressed to be for that purpose.

In *Re Player* (n) a sum of money was given by the debtor to assist him to start in business. This money, together with some of his own, was the son's capital, and it was held that the gift did not come within the section.

The fact that a gift of property is subsequently sold by the beneficiary does not prevent it from being a "settlement." It would appear to depend upon the intention with which the gift is made, and in this respect comparison may be made with *Re Hart* referred to later in this section.

An example of how property alienated will not pass to the trustee in bankruptcy may be taken from *Re Branson* (o), but it was on this ground that only one of the three judges of the Court of Appeal founded his judgment, while the other two held that the property had never vested in the trustee.

The facts were, that a nephew was taking a lease of an hotel, and, in order to assist him, his uncle provided a clock and signs to be affixed to the hotel. In consequence of these fixtures the lessors accepted a less rent. The uncle became bankrupt:

Held, by the Master of the Rolls, that since the clock had become the property of the lessors, and there was no money or other proceeds arising from the transaction in the hands of the nephew, the trustee took nothing.

The other two judges came to the same decision, but based their reasoning upon the fact that the nephew had never had

(n) (1885), 15 Q.B.D. 682.

(o) [1914] 3 K.B. 1086.

any property in the clock, and, of course, the lessors had given value (*p*). Their judgments are, therefore, authority for the proposition, that if a debtor parts with property to a person giving valuable consideration in order to benefit a volunteer, the volunteer does not have to indemnify the trustee in bankruptcy.

Furthermore, the exercise of a general power of appointment does not constitute a settlement falling within this section. The property was not vested in the debtor, and, therefore, the exercise of the general power did not constitute a settlement (*q*), although had he not exercised it his trustee would have been able to do so for the benefit of his creditors (*r*).

The Date of Commencement of the Period.—The date from which the periods of two and ten years begin to run is the date of the first act of bankruptcy within three months of the petition on which the debtor was adjudicated, *i.e.* from the commencement of the period of relation back (*s*). In practice, therefore, the period of ten years extends a little beyond the date of the actual adjudication in bankruptcy. This is important because a settlement actually made within the period of relation back is void under that rule. The property will vest in the trustee under the doctrine of relation back, unless it is protected (*t*) for other reasons, such as a protected dealing under s. 45, and requires no steps on the part of the trustee to set it aside (*u*).

Settlement is only Voidable.—Although s. 42 provides that a settlement coming within its provisions will be *void*, this has been repeatedly held to mean voidable at the instance of the trustee, so that it cannot be set aside until a trustee is appointed (*a*).

One consequence of this is that, since the trustee's title cannot relate back beyond the first act of bankruptcy, "every equity, which has been acquired before the act of bankruptcy, is to be respected, and is not in any way hit or interfered with" by the section.

(*p*) See *post*, p. 214.

(*q*) *Re Mathieson*, [1927] 1 Ch. 283.

(*r*) See *ante*, p. 165.

(*s*) *Re Lee*, [1904] 1 K.B. 451. This case was overruled, [1904] 2 K.B. 769, on the facts, because the C.A. held there was no available act of bankruptcy at the date of the transfer of the property.

(*t*) See *ante*, p. 134.

(*u*) *Re Gunsbourg*, [1920] 2 K.B. 426 (see *post*, p. 213).

(*a*) *Re Carter and Kenderdine's Contract*, [1897] 1 Ch. 776.

In *Re Hart* (b) this view was extended to cover the case of any transaction for value and without notice, which had taken place between the donee under the settlement and a third party before the trustee has obtained a declaration that the deed is voidable, or, at least, before a trustee has come into existence.

Protection of Purchasers from Beneficiaries.

In *Re Hart* (b) a father made a gift of shares to his daughter. The daughter sold the shares some time after their gift, but a few days before she did so her father had committed an act of bankruptcy. A receiving order, followed by adjudication, was made a few days after the transfer:

Held, that the *bona fide* transferee for value was protected. COZENS-HARDY, M.R. (at p. 10), said:

"In my opinion the true view is that a voluntary settlement 'is not void, but is only voidable by the trustee, who must 'apply to the Court for a declaration to that effect, and for 'consequential relief. It seems to me to follow that the trustee 'is in the same position as any other litigant who seeks a declaration that a deed is voidable, whether on the ground of fraud 'or undue influence, or otherwise. It is settled law that how- 'ever good a claim might be as against the grantee, the plaintiff 'cannot succeed if there has been any subsequent transaction 'for value and without notice."

This protection for a *bona fide* purchaser must be distinguished from the position of third parties, who take under a settlement which is void under the doctrine of relation back. If the donee sells to a purchaser under a voluntary settlement made within the doctrine of relation back, that settlement being void, the purchaser must make good (c).

In *Re Gunsbourg* (c) the debtor made a conveyance which was fraudulent. Within three months he was adjudicated, and therefore the bankruptcy related back to the conveyance, because it was itself an act of bankruptcy. In the meantime the donee had sold his interest to a *bona fide* purchaser:

Held, that the interest vested in the trustee in bankruptcy, since the settlement was void as within the doctrine of relation back, and not merely voidable under s. 42, Bankruptcy Act (d).

Title Revests in Debtor.—If the settlement is set aside the title to the property revests in the debtor; the declaration

(b) [1912] 3 K.B. 6.

(c) *Re Gunsbourg*, [1920] 2 K.B. 426.

(d) But see the dissenting judgment of YOUNGER, L.J., at p. 448.

does not give a title to the trustee overriding the donor and donee. The result is that the property will only vest in the trustee in bankruptcy, where it would not, apart from the bankruptcy, have vested through the debtor in some third person. So, if the property had been vested in the debtor and would have been divested in favour of a committee in lunacy, it will not vest in the trustee in bankruptcy (*e*).

Surplus Remains Settled.—The settlement will only be set aside sufficiently to meet the debtor's liabilities in the bankruptcy. If there is any surplus after payment of debts, then it will be held for the benefit of the beneficiaries under the settlement (*f*).

The Settlement must be Voluntary.—The section does not apply to settlements made for valuable consideration. Valuable consideration does not mean here simply such consideration as would satisfy the Common Law doctrine of consideration in contract. There must be a real and substantial consideration, having regard to the value of the property settled at the date of settlement (*g*). At the same time there need be no contract of purchase and sale in the ordinary mercantile sense of the word, so long as the grantee "gave—something in order to induce the grantor to give something".

In *Hance v. Harding* (*h*) the settlor assigned an insurance policy to trustees for the benefit of his children by reason of which the settlor's father also conveyed property to the same settlement:

Held, that the provision for his children obtained from the grandfather was sufficient consideration to take the settlor's assignment out of s. 42 (*i*).

Nature of Consideration.—However, the consideration need not be physical property; it may amount to nothing more than the release of a right of action; for example, an agreement not to bring divorce proceedings (*k*).

In *Re Cole* (*l*) a settlement was made in pursuance of a compromise in an action between the Attorney-General and

(*e*) *Re Farnham* [1895] 2 Ch. 799. (*f*) *Re Parry*, [1904] 1 K.B. 129.

(*g*) *Re Naylor* (1893), 62 L.J.Q.B. 460.

(*h*) *Hance v. Harding* (1888), 20 Q. B. D. 732.

(*i*) Section 91, Bankruptcy Act, 1869, as it then was.

(*k*) *Re Pope*, [1908] 2 K.B. 169. (*l*) [1931] 2 Ch. 176.

the debtors. This settlement settled the property of one of three debtors in favour of herself and her issue with a limitation over. FARWELL, J., held that it was a settlement for valuable consideration, and the unborn of issue of the debtor were purchasers, so that the settlement could not be set aside.

A settlement in favour of a person who has agreed to pay the interest on the mortgage, to which the property is subject, has likewise been held to be for valuable consideration (*m*). On the other hand, the settlement of an annuity in consideration of the discontinuance of a voluntary payment of the like amount, which had been paid to a wife by her husband, who was living separately from her, was not a settlement for value. The wife had not released a right to which she was legally entitled since the annuity was a voluntary payment (*n*).

Furthermore, the consideration must pass from the person claiming under the settlement and not from the bankrupt himself (*o*).

In *Re Parry* (*o*) the trustees of a settlement released part of their trust fund on condition that the beneficiary brought into settlement another fund. This was done and the beneficiary subsequently became bankrupt.

Held, that the fund brought into settlement was only the subject of a voluntary settlement, and so within s. 42. The substitution of one fund for the other had not constituted any valuable consideration on the part of the trustees.

Purchaser must Act in Good Faith.—Lastly, in respect of consideration, the purchaser must act *bona fide*. Knowledge that the settlement is made with intention to defeat the creditors of the settlor will prevent *bona fides*, and so the interest of the purchaser will not be protected because, despite the consideration, the conveyance can be set aside as fraudulent by the trustee (*p*).

For example, where a settlement is made in consideration of marriage, but both parties to the marriage have an intent to defeat creditors, the settlement will be invalid as against them as a settlement. Had the wife been an innocent party her interest would be protected, and the interests of the legitimate children would also be protected (*q*).

(*m*) *Re Charters*, [1923] B. & C.R. 94.

(*n*) *Re Macdonald*, [1920] 1 K.B. 205. (*o*) *Re Parry*, [1904] 1 K.B. 129.

(*p*) *Re Pennington* (1888), 5 Mor. 216, 268 (*ante*, p. 207).

(*q*) *Kewan v. Crawford* (1877), 6 Ch. D. 29; see *Re Cole* (*supra*).

The Solvency of the Settlor.—Where the settlement has been made more than two years prior to the date of bankruptcy, *and* the interest of the settlor passed on the execution of the settlement, the debtor's solvency *at the date of the settlement* is a material question. If the debtor was solvent the settlement would not be within the section (r). Solvency means that, without the property that passes to other persons under the settlement, the debtor must have been able to pay his debts (s).

In *Ex p. Huxtable* (s) the debtor settled an equity of redemption, but also covenanted to pay the mortgage debt. Apart from payment of the mortgage debt, he would have been solvent without the equity of redemption:

Held, that the covenant to pay the mortgage debt amounted to a settlement of the whole property; hence his liability to pay this debt made him insolvent for the purposes of the section.

He must pay his debts in the manner contemplated, so that if this includes the possibility of a forced sale the property must be valued accordingly (t). At the same time, if the settlor has given himself a life or other interest under the settlement, which will, of course, pass to the trustee in bankruptcy, the amount of the interest at the date of the settlement will be taken into account for the purposes of estimating his solvency (u).

Similarly, if the settlement reserves to the settlor the power to raise a sufficient sum to meet his debts at the date of the settlement, he is not insolvent (a).

Covenants to Settle After-acquired Property.—A covenant to settle after-acquired property in a voluntary settlement, if it has any effect at all (b), does not appear to affect the general rules of bankruptcy regarding the rights of the trustee in bankruptcy. Such a covenant contained in an

(r) See *ante*, p. 210. The rules as to the commencement of bankruptcy and what amounts to a settlement are the same as in the case of sub-s. (1) it would seem (see *ante*, p. 210).

(s) *Ex p. Huxtable* (1876), 2 Ch. D. 54.

(t) *Ex p. Russell* (1882), 19 Ch. D. 588.

(u) *Re Lowndes* (1887), 18 Q.B.D. 677. (a) *Re Baker*, [1936] Ch. 61.

(b) Some nice points on this may arise in view of the recent decision in *Re Arden*, [1935] Ch. 326, where it was held that if the property was in the trusts of the settlement, presumably, the property must be treated as settled at the date when it is transferred to the trustees.

ordinary settlement for valuable consideration would seemingly have the same effect upon any property brought into settlement in pursuance of the covenant as any other transaction for valuable consideration. The property could only be taken by the trustee in bankruptcy in those circumstances in which he could normally set aside the transaction.

Where, however, the valuable consideration given is that of marriage, special rules have been incorporated by s. 42 (2), (3). A covenant for the future payment of money or for the future settlement of property, wherein the settlor had no interest at the date of his marriage, will be voidable as against the trustee in bankruptcy if made within two years from the commencement of the bankruptcy (c), unless either

- (1) at the date of payment or transfer the settlor was able to pay all his debts without the aid of the property settled; *or*
- (2) the settlement was made in pursuance of a covenant to settle property expected to come from or on the death of a particular person named in the covenant *and* was made within three months after the property came into the possession or under the control of the settlor (d).

Emphasis should be laid on the fact that the exceptions are alternative. The property cannot be taken by the trustee in bankruptcy if at the date of settlement the debtor was solvent independently of the property. Only in the event of his insolvency independently of the property will it be necessary to show that the property came from a specified source and was settled within three months of its falling into possession. It will be observed that there is no question of the ten years' limit; if the settlement is made more than two years prior to bankruptcy it is valid so far as this sub-section is concerned.

Rule Applies only to Expectancies.—The subsection is only concerned with property in which the settlor had no more than an expectancy at the most. If he had any greater interest at the date of the settlement the property does not fall within the section whatever the title by which it came into his possession (e).

(c) See *ante*, p. 210. The rules as to the commencement of bankruptcy and what amounts to a settlement are the same as in the case of sub-s. (1) it would seem (see *ante*, p. 210).

(d) B.A. s. 42 (3).

(e) *Re Bulteel's Settlements*, [1917] 1 Ch. 251.

In *Re Bulteel's Settlements* (e) the settlor covenanted to settle "all that tenth part or share, or other the parts or share, parts or shares, to which he now is or eventually may become or be entitled of or in the trust property" comprised in a settlement over which the settlor's parents had a revocable power of appointment. At the date of the covenant the power had been exercised to give the settlor a tenth share, but this appointment was subsequently revoked, and a larger share was appointed. The property so appointed did not fall into the possession of the settlor till within a year of his bankruptcy:

Held, that the tenth share was not caught by the provisions of s. 42 (2), (3), and that the surplus after deducting the tenth share was caught. The fact that the appointment giving him the tenth share had been revoked and that the settlor took such share under a substituted appointment did not prevent it from being property settled at the date of the settlement and not under the after-acquired property clause. YOUNGER, J. (at p. 258), stated his conclusion as follows:

"For, in my opinion, the result of the enactment is at least "this: that if a settlor has any estate or interest in property at "the date of his marriage, than that property passes to the "trustees of the settlement comprising it unaffected by this "enactment, even although the property ultimately reaches "them under some title other than that derived from the "estate actually possessed by the settlor at the relevant moment. "In other words, while a settlor may not by his marriage "settlement withdraw from his creditors in the event of his "bankruptcy property which he may acquire after his marriage, "still he may so deal with property, and if it in any event and "by any title materialises may effectually so deal with it, if "at the date of his marriage he has an actual interest in it, "however remote or contingent."

An assignment of property may include also a covenant to pay sums which will constitute a covenant within the subsection. So, in *Re Cumming & West* (f), an assignment of an insurance policy together with a covenant to pay premiums constituted a transfer of the policy, but the covenant was a covenant within the section, since it was a covenant for the future payment of money.

At the same time, in order to get the benefit of this principle, the property must have an existence at the date of the settlement, and be identified. A covenant to assign future property

(e) *Re Bulteel's Settlements*, [1917] 1 Ch. 251.

(f) [1929] 1 Ch. 534.

not exceeding a certain amount may amount to an assignment for the purposes of *Re Lind* (g), but not so as to affect the operation of this clause. Consequently, the actual assignment by the settlor must be made to take effect outside the period prescribed by the Act (h).

In *Re Dent* (i) by marriage articles in 1914 it was agreed that the husband should transfer substantially his after-acquired property upon trusts to be agreed mutually subject to life interests of the husband and wife. Subsequently, the husband's father died and the trustees gave notice to the trustees of the father's will. In 1921 the husband executed a transfer to three trustees, of whom one only was a trustee of the marriage articles, upon trusts for his wife and children in pursuance of the marriage articles. In the subsequent bankruptcy of the husband it was held that the assignment did not fall within the marriage articles because they had insufficiently determined the trust upon which the property was to have been held or the trustees, who were to officiate. It was also held that the transfer of the reversionary interest under the father's will only took place on the assignment by the husband and not on notice given by the trustees.

Apart from the problem of the forms of property falling within s. 42 (3), there is no great difficulty in applying the section. One question may arise, namely, the kind of assignment sufficient to protect the property from the trustee in bankruptcy when it comes from a specified source and the defence is that it has been settled within three months of falling into the debtor's possession.

What Assignment will be Sufficient?—The nature of the assignment by the settlor will depend entirely upon the property to be assigned. If, for example, it is a chattel, which passes by delivery, this will be sufficient without a bill of sale (k).

In *Re Magnus* (k) the husband covenanted to settle all future furniture. He never executed any bill of sale in favour of the trustees of the furniture subsequently acquired, but the trustee saw it, and it was employed in a house in which the wife, the beneficiary under the settlement, lived:

(g) [1915] 2 Ch. 345 (see *ante*, p. 164).

(h) *Re Dent*, [1923] 1 Ch. 113.

(i) [1923] 1 Ch. 113.

(k) *Re Magnus*, [1910] 2 K.B. 1049.

Held, that there had been a sufficient assignment. FARWELL, L.J. (at p. 1,055), put the law thus:

"The words 'actually transferred' must be read with reference 'to the subject-matter of the transfer. If it is land, a deed is 'required; if it is furniture or chattels, they pass by delivery. . .
 "In this case the property went to the right people; it was held 'by the *cestuis que trust* in accordance with the trusts of the 'settlement, and it was in the eye of the law in the possession 'of the trustee."

In any case, therefore, it will be necessary to consider the precise form of assignment at law or in equity, as the case may be, which is appropriate to the interest sought to be transferred.

Effect of Bankruptcy upon the Covenant itself.—Apart from property coming to the settlor in right of his spouse, the effect of the Act upon the covenant to settle after-acquired property is to render it voidable from the date of the bankruptcy against the trustee in bankruptcy. In effect, therefore, no subsequent settlement in pursuance of the covenant will be valid if the trustee requires the property for the satisfaction of creditors. On the other hand, the beneficiaries have a right of proof in respect of the covenant, but postponed to all creditors for value (*l*).

Section 42 does not apply to Administration of Deceased's Estates.—Section 42 does not apply where there is an administration of a deceased's estate under s. 130, since, though that section provides for administration in bankruptcy of the deceased's property, interests falling within this section are not his property, but are the property of a third party (*m*).

Voluntary compared with Fraudulent Settlements.
 —No question of fraud arises in the avoidance of settlements coming within s. 42, and therefore they must be carefully distinguished from the cases of fraudulent settlements, which are set aside under the Law of Property Act, 1925, s. 172.

In the latter cases there is no time limit, and they are voidable independently of bankruptcy, though in point of fact the question usually arises only where there is an insolvency. Nor do the beneficiaries under a fraudulent settlement retain any rights, whereas in respect of covenants to settle after-acquired

(*l*) See B.A., s. 42 (*z*).

(*m*) *Ex p. Official Receiver* (1887), 19 Q.B.D. 92.

property, beneficiaries are postponed creditors in the bankruptcy by express provision (n), and in respect of voluntary settlements it has been held that they are entitled to the surplus (o).

ASSIGNMENT OF BOOK DEBTS

Avoidance of Assignment of Book Debts.—Any general assignment of book debts, whether or not by way of security or charge (p), will be void against the trustee in respect of debts not paid at the date of the commencement of bankruptcy unless the assignment is registered in accordance with the provisions of the Bills of Sale Act, 1878, as an absolute bill of sale (q); that is to say, it must be registered in the Central Office of the Supreme Court. To this rule there are certain exceptions which make the application of the section very much narrower; they are: (i) book debts due at the date of assignment from specified debtors; (ii) debts growing due under specified contracts; (iii) any assignment of book debts included in a transfer of a business made *bona fide* and for value; and (iv) any assignment of assets for the benefit of creditors generally.

3. PROPERTY OF UNDISCHARGED BANKRUPT

Capacity to Acquire Property.—There is nothing to prevent a bankrupt from acquiring property; he does not undergo any loss of capacity in that sense. At the same time, until he obtains his discharge he may only accumulate capital subject to liability to be called upon to discharge outstanding debts. Therefore, if the bankrupt does by any means acquire property before his discharge, other than an income sufficient for the maintenance of himself and family, the trustee can claim it in the bankruptcy.

It should be emphasised that only income is exempt from this; a lump sum which would by itself only produce a sufficient income is not treated as income.

Banking Account.—So careful is the law to appropriate any capital to the trustee that it is provided by s. 47 (2) that

(n) B.A. s. 42 (2).

(o) See *ante*, p. 214.

(p) B.A. s. 43 (2); see *Re Lovegrove*, [1935] Ch. 464.

(q) B.A. s. 43 (1).

where a banker has ascertained that a person having an account with him is an undischarged bankrupt, then, unless he is satisfied that the account is on behalf of some person other than the bankrupt, he must give notice to the Board of Trade. Furthermore, after such notice, he may only pay out on an order of the Court or on instructions from the trustee in bankruptcy, unless he has received no instructions from the trustee within a month of giving the notice to the Board of Trade.

Position of After-acquired Property.—The general position concerning after-acquired property is that anything the bankrupt acquires by earning, transfer, or devolution on death, will vest in him in the first place. Subject to what is said hereafter relating to protected transactions the trustee in bankruptcy can intervene at any time after this acquisition by the bankrupt, and the property will then vest in him and become divisible between the creditors in the bankruptcy. Speaking generally, then, a bankrupt, though he can acquire property, cannot transfer it to make a good title in the transferee against the trustee in bankruptcy. In order not to prejudice commercial activity too far there is special protection for *bona fide* purchasers.

It is provided by the Act (7) that

any transaction with property real or personal acquired after adjudication and before any intervention by the trustee shall be protected in favour of a *bona fide* purchaser for value.

This does not mean that any money received by the bankrupt will not be liable to pay his debts, but that a purchaser from the bankrupt will be entitled to the land or other the subject-matter of the transaction.

This protection afforded by the Bankruptcy Act is largely the statutory enactment of a principle known as the rule in *Cohen v. Mitchell* (s), which, however, did not relate real estate (t). The conflict between the general conception of the trustee's rights and the protection of purchasers has obscured the nature of the bankrupt's interest in after-acquired property. This position can only be appreciated by observing the words of certain important judgments.

The Nature of the Bankrupt's Interest.—FRY, L.J., in *Cohen v. Mitchell* (at p. 269), expressly quotes this passage from the judgment in an earlier case (a):

(7) B.A. s.47 (1)

(s) (1890), 25 Q.B.D. 262.

(t) *Re New Land Development Assn. and Gray*, [1892] 2 Ch. 138.

(a) *Herbert v. Sayer* (1844), 5 Q.B. 965.

"The effect of the statutory enactments may be either to transfer immediately such property or contracts from the bankrupt to the trustees, vesting the property in the bankrupt for an instant only, or to give the trustees the beneficial interest, and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute; and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payment for such purchases and for all other debts due to the uncertificated bankrupt, would be invalidated . . . and the only way by which they can be rendered valid, and great confusion, inconvenience, and hardship prevented is by adopting the latter construction, and holding that the bankrupt acquires property, and contracts for the trustees, who may, whenever they please, disaffirm his act; but until they do so his acts are all valid."

This clearly states the proposition that the property acquired after adjudication does not vest exclusively and at once in the trustee.

The difficulty of giving effect to an equitable view of such dealings and applying sound law was stated in *Cohen v. Mitchell* (*supra*) by Lord Esher, M.R. (at p. 266):

"Of course, all the property which belongs to the bankrupt at the time of the bankruptcy becomes at once the property of the trustee. But does all the property acquired by the bankrupt after his bankruptcy belong to the trustee absolutely, so that the bankrupt is divested of all interest and property in it, or does it remain the property of the bankrupt, so that at any rate he can deal with it until the trustee interferes? In the case of property coming under the bankruptcy, if the bankrupt were to endeavour to maintain an action in which the defendant was not estopped from denying the bankrupt's property in the subject-matter of the action, it would be a good plea that the property is not his, but is vested in the trustee; but with regard to after-acquired property, it has been held that such a plea would be bad unless it went on to show that the trustee had intervened before the transaction in respect of which the action is brought. That seems to be conclusive to show that the bankrupt has a property, whether absolute or not is immaterial, in such things till the trustee intervenes."

Fry, L.J. (at p. 269), was in some ways more explicit; he

adopted the passage from *Herbert v. Sayer*, cited *supra*, and said:

"Now I adopt that view, with the single exception that I "think the language 'disaffirm his act' should be interpreted "to mean 'intervene,' because I do not think that the trustee "who does intervene has any power retrospectively to disaffirm "what has otherwise been validly done by the bankrupt; but "from the moment of his intervention the property vests in "him absolutely, and can no longer be recovered by or dealt "with by the bankrupt."

Trustee cannot Withdraw Intervention.—This view of FRY, L.J., was adopted in *Hill v. Settle* (b), so that it was held that, once the trustee had intervened, the property vested in him absolutely, and consequently he could not withdraw his intervention to enable the bankrupt to exercise any powers over the property should he so desire. Manifestly, the curious position of the bankrupt before the intervention of the trustee is hard to classify scientifically. It virtually amounts to this,

that the bankrupt can exercise powers over the property in favour of a *bona fide* purchaser for value, provided he does so before the intervention of the trustee.

Interest of Trustee.—This presents an alternative solution. The property may be said to vest in the trustee subject to a power in the bankrupt to divest in favour of a purchaser. Alternatively, it can be suggested that the property is, in fact, vested in the bankrupt.

Were the matter free from authority it would probably be simpler and more scientific to suggest that all the bankrupt has is a power over the property and not a title to the property. Unfortunately, perhaps, this theory has not been adopted. In *Hill v. Settle* (*supra*) COZENS-HARDY, M.R. (at p. 324), puts the matter in this way:

"Assuming, as in my view, I have stated is the fact, that there "was a good intervention, from the date of the notice the "property cannot be recovered by or dealt with by the bank- "bankrupt. That [*Cohen v. Mitchell*] seems to me to be an "authority which shows that, even if the view is that the "property was vested in the bankrupt until intervention, that "will not help the bankrupt here. I think that the truer and

(b) [1917] 1 Ch. 319.

"safer view is that which is expressed by several of the judges, "that he was something in the nature of an agent who had "power to deal in these transactions for value with the bankrupt's after-acquired property before intervention, but that "was a right which ceased absolutely on intervention; from "that moment the trustee's title was absolutely complete, and "the property could no longer, in the language of FRY, L.J., be "dealt with by the bankrupt."

It is respectfully submitted that the language of this judgment precisely meets the vagueness with which the situation is invested. The description of "an agent with a power" does not fit with the trustee's title becoming "absolutely complete." In *Re Clark* (c) Lord ESHER said (at p. 404): "I cannot see how by the application of the law of principal and agent the bankrupt can be said to have been the agent of the trustee in dealings with after-acquired property of which the trustee had no notice."

It is not possible, in view of the weight of authority, now to say that property acquired after adjudication remains vested in the bankrupt till the trustee intervenes; it has been too frequently asserted that such property belongs to the trustee. Take, for example, *Re Stokes, Ex p. Mellish* (d).

In this case a bankrupt was employed by the trustee in respect of the winding up of his estate. Out of the income allowed him he took out an insurance policy; after his discharge he continued to pay the premiums. Until his death his trustee in bankruptcy had no notice of the policy:

Held, that the policy passed to the trustee in bankruptcy. Further, held that the doctrine of *Ex p. James* (e) did not apply to mere volunteer payments of premiums without knowledge of the trustee (f). HORRIDGE, J. (at p. 261), said:

"The policy was effected after the liquidation resolution, "and it belonged to the trustee. The bankrupt never told him "that he was paying any premiums, and on the authorities to "which I have referred it is clear that the policy belonged to "the trustee, and therefore now belongs to the Official Receiver."

In *Re Bennett* (g) a personal representative went so far as to distribute policy moneys in similar circumstances.

Held, that he was protected but beneficiaries must refund.

(c) [1894] 2 Q.B. 393.

(e) See *ante*, p. 175.

(g) [1907] 1 K.B. 149.

(d) [1919] 2 K.B. 256.

(f) *Re Leslie* (1883), 23 Ch. D. 5

From this review of the cases it would appear that the title of the trustee exists from the acquisition of the property, but it is hard to see how two distinct titles to the same property can exist. Enough, perhaps, has been said to show the difficulty of the position. The law was stated in a form frequently adopted in later cases by Lord ESHER, M.R., in *Cohen v. Mitchell* (h):

"I am, therefore, prepared to lay down a proposition which "has been agreed upon by us all, and which has been written "down by my brother LOPES. It is this—until the trustee "intervenes, all transactions by a bankrupt after his bank- "ruptcy with any person dealing with him *bona fide* and for "value, in respect of his after-acquired property, whether with "or without knowledge of the bankruptcy, are valid against the "trustee. It will be seen, I think, from the wording of that "proposition, that the stress of *bona fides* is laid entirely and "solely on the person dealing with the bankrupt; and if he has "dealt in good faith, the question of whether the bankrupt, as "between himself and the creditors, is also dealing in good "faith is immaterial."

Protection of Purchasers.—It is now necessary to examine more closely the protection afforded to *bona fide* purchasers by s. 47 in their dealings with the bankrupt. In the first place, the section itself provides that:

The receipt of any money, security, or negotiable instrument, from, or by the order or direction of, a bankrupt by his banker, and any payment and any delivery of any security or negotiable instrument made to, or by the order or direction of, a bankrupt by his banker, shall be deemed to be a transaction by the bankrupt with such banker dealing with him for value.

Apart from this the question of the property within the section has been the subject of litigation, but it must be remembered that it now covers both real and personal property.

Property which is within the Section.—Some difficulties have arisen upon the nature of the rights that can be brought within this s. 47. Perhaps the most instructive decision is that of *Bailey v. Thurston & Co.* (i), where a right of action for breach of a contract, entered into prior to bankruptcy but continuing after adjudication, was after-acquired property when the breach was also committed after adjudication.

(h) (1890), 25 Q.B.D. at p. 267. (i) [1903] 1 K.B. 137.

In *Bailey v. Thurston & Co.* (*supra*) a commercial traveller entered into a contract for service, which continued until after he had been adjudicated bankrupt. His employers then broke their contract, and argued that, as he was an undischarged bankrupt, he could not sue:

Held, that, as the right of action only accrued after adjudication, he could sue. STIRLING, J. (at p. 145), stated the law briefly: "Two cases—*Emden v. Carte* (*k*) and *Wadling v. Oliphant* (*l*)—were relied on to support the view that the plaintiff could "not recover in this action; but they seem to me to decide no "more than that the trustee may intervene and claim the "damages which the plaintiff has recovered" (*m*).

Choses in Action.—In *Cohen v. Mitchell* (*supra*) the subject-matter of the action was a chose in action to which the rule was held to apply, as was pointed out when the question was subsequently raised in *Re New Land Development Assoc. and Gray* (*supra*) and *Re Behrend's Trust* (*infra*). A much more recent case is *Dyster v. Randall & Sons* (*n*).

In this case a bankrupt entered into a contract to purchase land by employing an agent who did not disclose his principal. On discovering who was the principal, the vendors refused to complete:

Held, that the bankrupt was entitled to specific performance of the contract until his trustee intervened.

Future Property.—Furthermore, the transaction may be in respect of future property, such as a legacy, even although the trustee may have intervened before the property falls into possession (*o*). It is submitted, however, that where property has passed to the trustee any income arising from that property cannot vest in the bankrupt as after-acquired property (*p*).

Necessity for Valuable Consideration.—In order however, for the transaction to be enforceable there must be valuable consideration to support it, and it must, in fact, be a transaction with the bankrupt.

In *Hosack v. Robins* (*No. 2*) (*q*) an undischarged bankrupt acquired certain shares. Subsequently a judgment was recovered

(*k*) (1881), 17 Ch. D. 169, 768. (*l*) (1875), 1 Q.B.D. 145.

(*m*) Much importance was attached to *Beckham v. Drake* (1849), 2 H.L. Cas. 579, discussed *ante*, p. 189.

(*n*) [1926] Ch. 932.

(*o*) *Hunt v. Fripp*, [1898] 1 Ch. 675.

(*p*) *Markwick v. Hardingham* (1880), 15 Ch. D., at p. 349.

(*q*) [1918] 2 Ch. 339.

against him, and this judgment was enforced by a charging order against these shares. The trustee in bankruptcy then intervened, and claimed the shares:

Held, that the trustee was entitled to them free from the charging order, since it was not a transaction for valuable consideration. SWINFEN EADY, M.R. (at p. 345), said:

"The question, then, is whether a transaction—or, rather, "a process—of this sort was a dealing or transaction with the "bankrupt for value. It is in reality a process *in invitum*; and "there was no dealing with the bankrupt at all, but merely a "taking in execution by process of law of what the judgment "creditor was able to seize. In my opinion, it was no more "a dealing or transaction for value with the bankrupt than a "garnishee order would be."

Marriage Consideration.—Valuable consideration need only be the marriage consideration; no resulting benefit to the bankrupt is necessary to support the transaction. In the instructive case of *Re Behrend's Trust* (r) this point was settled among others implicitly overruling a dictum (s) that the transaction must be in the course of business.

Here there was an antenuptial settlement of reversionary interests:

Held, that it was for valuable consideration, and good because *Cohen v. Mitchell* included choses in action as well as pure personality. Further, it was held that the fact that the trustees of the reversionary fund had notice of the bankruptcy did not prevent them from holding on the trusts of the settlement.

The Transaction must be Bona Fide.—Although the transaction must not only be for value, but also *bona fide*, it is not lack of *bona fides* to enter into an honest transaction with an undischarged bankrupt (t). It is, of course, immaterial whether the bankrupt is honest, but the other party must be; nevertheless, notice of bankruptcy does not constitute *mala fides*, nor render necessary any inquiries.

In *Re Bennett* (*supra*) a policy fell in on the death of an undischarged bankrupt who had paid the premiums without the knowledge of the trustee. The personal representative distributed the fund among the beneficiaries and then the trustee intervened:

(r) [1911] 1 Ch 687.

(s) See *Re Rogers* (1891), 8 Mor. 236.

(t) *Re Bennett*, [1907] 1 K.B. 149.

Held, that the personal representative was protected by s. 47, but the beneficiaries had to refund, because a bankrupt is not entitled to make a present of the property to a donee, however honest.

Property in Second Bankruptcies.—In connection with after-acquired property one of the difficulties is the case of a second bankruptcy. In these circumstances some doubt may be experienced in ascertaining the person who will be entitled to the property acquired after the first adjudication, and before the second bankruptcy. This, therefore, may be a suitable opportunity for explaining the statutory provisions in that respect. Until the Act of 1913 the property normally all vested in the trustee in the bankruptcy. This was altered by s. 11 of the Act of 1913, and is now governed by the Bankruptcy Amendment Act, 1926, s. 3.

This section reads as follows:

For s. 39 of the Principal Act [Bankruptcy Act, 1914] (which relates to a second or subsequent bankruptcies), there shall be substituted the following section, that is to say:

- (1) Where a second or subsequent receiving order is made against a bankrupt, or where an order is made for the administration in bankruptcy of the estate of a deceased bankrupt, then for the purposes of any proceedings consequent upon any such order, the trustee in the last preceding bankruptcy shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy.
- (2) In the event of a second or subsequent receiving order made against a bankrupt being followed by an order adjudging him bankrupt, or in the event of an order being made for the administration in bankruptcy of the estate of a deceased bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall (subject to any disposition thereof made by the Official Receiver or trustee in that bankruptcy, without knowledge of the presentation of the subsequent petition, and subject to the provisions of s. 47 of this Act) vest in the trustee in the subsequent bankruptcy or administration in bankruptcy as the case may be.
- (3) Where the trustee in any bankruptcy receives notice of a subsequent petition in bankruptcy against the bankrupt,

or after his decease of a petition for the administration of his estate in bankruptcy, the trustee shall hold any property then in his possession which has been acquired by the bankrupt since he was adjudged a bankrupt until the subsequent petition he disposed of, and, if on the subsequent petition an order of adjudication or an order for the administration of the estate in bankruptcy is made, he shall transfer all such property or the proceeds thereof (after deducting his costs and expenses) to the trustee in the subsequent bankruptcy or administration in bankruptcy, as the case may be.

Second Receiving Order Prevents Distribution.—Putting it briefly, the trustee in bankruptcy is prevented from dealing with the debtor's property so soon as he has notice of another petition. So soon as a receiving order is made the trustee is, "for the purpose of any proceedings consequent on such an order," to be deemed a creditor against the property in that bankruptcy. If instead of adjudication a composition is sanctioned by the Court he will still be a creditor, because it is a proceeding consequent upon the receiving order, though it is not a bankruptcy. In such a case, however, there is certainly no provision for the property to vest in the trustee of the composition until an adjudication is made. It may, however, be judicially interpreted to mean that he will be bound to vest the property before he can prove, and that, as he is a creditor in such proceedings, he cannot employ the property vested in him for paying creditors.

Property Vests in Second Trustee.—At the same time, where there is by reason of property acquired after the first adjudication but before the commencement of the second bankruptcy, a surplus after paying all the debts in the first bankruptcy, then the trustee in the second bankruptcy will only take that part of the surplus which has not been effectually dealt with by the debtor. So soon as there is a surplus, even if it is unascertained, it is held upon trust by the trustee in bankruptcy for the benefit of the bankrupt. It is submitted that, irrespective of the rule in *Cohen v. Mitchell* (u), such surplus can be dealt with by the bankrupt in whatever way he wishes, provided that it is not otherwise contrary to the bankruptcy laws (a).

In *Bird v. Philpott* (a) FARWELL, J. (at p. 828), stated the law as follows:

(u) *Ante*, p. 222.

(a) *Bird v. Philpott*, [1900] 1 Ch. 822.

"As I read the Bankruptcy Act, the trustee takes all the "bankrupt's property for an absolute estate in law, but for "limited purposes, namely, for the payment of creditors in "the bankruptcy, and that bankruptcy only—payment of "principal and interest, and all the costs of the bankruptcy. "Subject to that, he is a trustee for the bankrupt of the surplus. "He, as a trustee, is in a better position than an ordinary "trustee to the extent pointed out in *Ex p. Sheffield*, in *Re Austin (b)*, and in *Re Leadbitter (c)*, that is to say, the bankrupt has not the ordinary right of a *cestui que trust* to intervene "until the surplus has been ascertained to exist, and all the "creditors and interest and costs have been paid . . . but . . . "he can demand the surplus, and he has a right to the surplus "—a right which he can dispose of by will or deed or otherwise "during the pendency of the first bankruptcy, even before the "surplus is ascertained, although such disposition will, of "course, be ineffectual unless in the event there prove to be a "surplus upon which it can operate."

However, in *Re Clark (d)* it was held that on a composition with creditors after-acquired property vested in the trustee in bankruptcy. Although a composition is made for valuable consideration, it is an act of bankruptcy and therefore the property must vest in the trustee in bankruptcy of either the first or second bankruptcy, and s. 47 could not apply to protect it.

To what cases the Section Applies.—Section 39 as amended applies, although any of the bankruptcies may have occurred prior to 1913 (e).

In *Re Cohen (e)* one bankruptcy occurred in 1908, and the second in 1911. In 1916 after-acquired property came to the hands of the trustee:

Held, that s. 39 applied, and the trustee in the 1908 bankruptcy could prove by reason of s. 168 (2) and s. 39 (f).

Furthermore, where the first bankruptcy was of a partnership and also of their separate estates, and where one of the partners ultimately goes bankrupt a second time, the trustee in the first bankruptcy can prove in the second bankruptcy in respect of joint debts (g).

The proof is the proof of the trustee and not the creditors individually (h).

(b) (1879), 10 Ch. D. 434.

(d) [1894] 2 Q.B. 393.

(f) Explaining *Re Cullwick*, [1918] 1 K.B. 646.

(g) *Re Moss*, [1923] B. & C.R. 135.

(c) (1878), 10 Ch. D. 388.

(e) *Re Cohen*, [1919] 2 K.B. 271.

(f) Explaining *Re Cullwick*, [1918] 1 K.B. 646.

(h) *Re Cullwick*, [1918] 1 K.B. 646.

At the same time the property must, in fact, be after-acquired property, and not merely property which has fallen into possession since adjudication (*i*).

There was a right under a covenant to settle which was contingent at the date of the adjudication, but ultimately fell into possession:

Held, that it was not within Bankruptcy Act, s. 39 (now Bankruptcy Act, 1926, s. 3) (*i*).

Sequestration of Ecclesiastical Benefice.—There are two further sections which deal with property accruing during the continuance of the bankruptcy. These sections deal with income primarily which is a species of after-acquired property, but is peculiar in that it is not a capital sum and can hardly so be regarded when it comes from a particular source in respect of personal services rendered.

The first cases is that of income derived from an ecclesiastical benefice. A benefice cannot, of course, vest in the trustee "because he is a layman; it is an estate which can only be held by a clerk" (*k*). In consequence, provision is made for the payment of the profits of the benefice by means of a sequestration order, which will also provide for the performance of divine service in the church (*l*).

The profits of the benefice do not vest in the trustee on adjudication, but it is necessary to get a sequestration order from the Bishop before they will do so (*m*). Once an Ecclesiastical Court has granted a sequestration it has no power at the instance of the debtor to relax the sequestration even on proof of the discharge of the debtor, because the Ecclesiastical Court has no authority to determine whether the discharge has satisfied the sequestration, which may, in fact, have been intended to continue (*n*).

At the same time, though a debtor has obtained his discharge, the trustee may issue a sequestration, if the benefice was held at the date of the bankruptcy (*o*).

(*i*) *Re Silber's Settlement*, [1920] W.N. 77.

(*k*) *Per* BACON, in *Ex p. Chick* (1879), 11 Ch. D. at p. 733. Though JESSL, M.R., in *Ex p. Huggins* (1882), 21 Ch. D. 85, at p. 92, sometimes speaks of it as vesting, it is submitted that he refers to the profits after compliance with the provisions of s. 50.

(*l*) B.A. s. 50.

(*m*) *Hopkins v. Clarke* (1864), 5 B. & S. 753, affirming the decision in the Court below, reported at 4 B. & S. 836.

(*n*) *Re Lawrence*, [1896] P. 244. This was only the decision of the Chancellor of the Consistory Court of Winchester.

(*o*) *Ex p. Chick* (1879), 11 Ch. D. 731.

Bishop Responsible under Sequestration.—Although the Bishop appoints a sequestrator, he is the person responsible for the conduct of the sequestration. He will make provision out of the profits of the benefice for the performance of divine service, and for this purpose he may pay a stipend to the incumbent or some other priest as curate (*p*). He also may pay the stipend of any duly licensed curate for a period of four months preceding the receiving order (*q*). If any payment is made to the sequestrator under a mistake of fact, and the Bishop has received the money, it is he and not the sequestrator who is liable to return the money, even though he has paid it to the trustee (*r*), because it is he who is really the principal in a sequestration, and the sequestrator is his agent.

Sequestration of Salary or Income.—The other section is of much more general application, and deals with the question of the "salary or income" of the debtor (*s*). This section has two distinct provisions.

First, it is concerned with the pay of an officer of the Crown, whether in one of the combatant services or in the civil service. In this case the trustee must apply to the Court for an order to obtain any part of the salary, and the Court has only power to make an award with the written consent of the chief officer of the department, under which the pay or salary is received (*t*).

Secondly, all half-pay or payments in compensation made by the Treasury to Crown servants after they have left their employment, and all salary or income derived from any employment on the part of a bankrupt, is subject to such order as the Court may think fit. Nothing in the section is to take away or abridge any power of the chief officer of any public department to dismiss the bankrupt or declare the half-pay or pension forfeited (*u*).

If the trustee intends to apply to the Court for sequestration he must give notice to the bankrupt specifying the time and place of hearing, and the right of the bankrupt to oppose the application (*a*).

In the case of the pay of a Crown servant a copy of any proposed order must be communicated to the chief officer of the department concerned, and the application stands adjourned until his consent is obtained (*b*).

(*p*) B.A. s. 50 (2).

(*r*) *Baylis v. Bishop of London*, [1913] 1 Ch. 127.

(*t*) B.A. s. 51 (1).

(*a*) B.R. 272.

(*q*) B.A. s. 50 (3).

(*s*) B.A. s. 51.

(*u*) B.A. s. 51 (2), (3).

(*b*) B.R. 273.

In other cases the trustee communicates the order to the chief of the department concerned (c).

If the bankrupt ceases to receive the salary or emolument he may apply to the Court to rescind or reduce the order (d).

No Sequestration for Voluntary Allowances.—The section does not apply to any purely voluntary allowances made to the debtor by some person (e):

“It seems to me that the words mean a salary or an income “to which the bankrupt is legally or equitably entitled, and not “a mere voluntary payment” (f).

Of course, the pay of a Crown servant is virtually always at pleasure as is his service (g), but quite clearly the express provision covers this case, even in cases of lump sum compensation (h).

In consequence of the view that a voluntary allowance is not subject to the section, care must be taken to see that it is the income or salary at the date of the order, because, if an agreement as to the remuneration has been validly altered, then it is the actual remuneration that must be considered on the application for an order (i).

In *Re Shine* (i) an actor originally agreed with a manager to work for him at £30 a week for two years, but subject to be put an end to by a day's notice. Subsequently the manager made certain payments on behalf of the debtor, and there was an agreement that he should receive only £10 a week, as £20 a week was to be deducted from his salary. He was also paying £4 a week to his wife for alimony:

Held, that his actual salary was £10 a week at the date of the application, and an order could only be made in respect of that sum. Order refused.

The first part of the section will apply only to persons actually in the service of the Crown. Even though they may be liable to serve again, if they have ceased to be actively employed they fall under the second head and no consent is necessary to the order of the Court (k). An officer, on retired

(c) B.R. 274.

(d) B.R. 275.

(e) *Ex p. Wicks* (1881), 17 Ch. D. 70.

(f) *Ibid.*, per JAMES, L.J., at p. 73.

(g) See, e.g. *Leaman v. Regem*, [1920] 3 K.B. 663.

(h) *Re Lupton*, [1912] 1 K.B. 107.

(i) *Re Shine*, [1892] 1 Q.B. 522.

(k) *Re Ward*, [1897] 1 Q.B. 266.

pay, receives his pension, not because he is liable to be recalled to the colours, but in respect of past services (*l*).

When the Court makes an order, it will take into consideration that there should remain sufficient "fairly and liberally for the support of the bankrupt" (*m*). The support of the bankrupt includes the support of his wife and family, if he has one.

What is Salary or Income.—The most serious difficulty that arises on this section is what is "salary or income." These words have been held to be properly construed *ejusdem generis* (*n*), but this view must be modified to include regular income, which could scarcely be regarded as salary as, for example, maintenance under an order of the Divorce Division (*o*). Putting the matter concisely, "salary or income" would appear to mean remuneration paid at stated times under a binding obligation to make the payment, and not earnings of an irregular character, however large. The important difference appears to be that salary or income remains completely the property of the debtor, apart from any order of the Court, whereas other property to be divisible among creditors must vest in the trustee. This becomes apparent on consideration of the decision in *Re Garrett* (*p*) approved in *Re Landau* (*q*).

In *Re Garrett* a retired police officer was adjudicated bankrupt. Under the Police Pensions Act, 1921, s. 14, his pension could not pass to the trustee in bankruptcy. It was held by FARWELL, J., that the Court could make an order under s. 51 (2) in respect of the pension as "income or salary" within that provision.

On the other hand, what may be looked on as income may be property, which passes to the trustee, because it is not merely personal earnings, but is dealt with as property. In such circumstances the creditors would obtain the benefit of the whole amount as distinct from such surplus of income

(*l*) *Per* JESSEL, M.R., in *Ex p. Huggins* (1882), 21 Ch. D., at p. 91. He treats it as though the trustee has all of it except that he may only apply such part of it to the use of the creditors as the Court may order; it is very respectfully submitted that no part of it goes to the creditors unless the Court otherwise orders, which is the converse proposition.

(*m*) *Re Rogers*, [1894] 1 Q.B., at p. 431, and see *Re Shine*, [1892] 1 Q.B., at p. 532.

(*n*) See *Ex p. Benwell* (1884), 14 Q.B.D., at p. 307.

(*o*) *Re Landau*, [1934] 1 Ch. 549 (see *post*, p. 237).

(*p*) [1930] 2 Ch. 137.

(*q*) [1934] 1 Ch. 549.

as is necessary for the maintenance of the bankrupt. This is made clear in *Re Rogers* (r).

In this case an eminent dentist was in partnership, and went bankrupt. He continued the partnership, receiving a share of the profits:

Held, that this share of the profits vested in the trustee bankruptcy independently of s. 53 (now s. 51), and that the whole could be utilised for the benefit of creditors, because, although the share was due largely to his personal skill, it was not salary or income. There was a *dictum* to the effect that a share in the profits of a partnership would never be personal "salary or income." VAUGHAN WILLIAMS, J. (at p. 431) said:

"Even if the receipts here would fall properly within the "description of personal earnings, as intended by the rule in "question, yet I am by no means prepared myself to say that "such personal earnings would not lose that character by being "dealt with by the bankrupt himself as property for the purpose "of a partnership with other people. It seems to me that that "which the bankrupt earned, although it might originally "have been his personal earnings, ceases to have that character, "and comes to be property in the true sense of the word when "it is the net share which the bankrupt is entitled to of the "partnership earnings under his arrangement with his partner."

The leading case on what is "salary or income" is *Ex p. Benwell* (s). According to this decision it would seem that the Act contemplates a remuneration fixed by contract so that some certainty of its continuance and regularity exists.

In *Ex p. Benwell* (*supra*) the bankrupt was a bone-setter who received considerable fees in respect of his skill. It was not denied that any sums he had received might be vested in the trustee and be at his disposal, but the Court refused to make any order in respect of his future professional earnings on the ground that they were not salary or income.

"The question is whether the income which a man earns by "the exercise of his personal skill, and which is dependent "upon the accident whether people come and consult him or "not, and upon whether he chooses to be consulted, is income "in the nature of a salary. It is only necessary to state the case "to show that it is not" (*per* BRETT, M.R., at p. 307).

(r) [1894] 1 Q.B. 425.

(s) (1884), 14 Q.B.D. 301.

This case was applied to the earnings of a miner in *Re Jones* (t), in which case CAVE, J. (at p. 232), put the law thus:

"Yet, inasmuch as he was not entitled to receive that money
"with respect to any particular period, such as a year or some
"part of a year, irrespective of the amount of work he did, the
"money so received was not 'income' *ejusdem generis* with
" 'salary.' "

The money to be income must not form part of his earnings in his business, even although the business is of a character which involves a large amount of personal skill and attention by the bankrupt (u).

For example, a surgeon-apothecary (a) sold medicines, and an architect (b) sold plans, and hence the results of his earnings arising partly from his personal earnings and partly from his business formed property which would fall with the Bankruptcy Act, 1926, s. 3, and not Bankruptcy Act, 1914, s. 51.

Purely personal earnings, which are not necessary for the support of the bankrupt, his wife and family, will pass to the trustee in bankruptcy, though they are not "income or salary" (c).

The matters falling within the section have been reviewed by the Court of Appeal in *Re Landau* (d). In that case the bankrupt was entitled to maintenance under an order of the Divorce Division by way of a considerable annual sum. The Court of Appeal held that an order might be made under s. 51 (2). It was argued on behalf of the bankrupt that the section applied only to interests that could fall within the definition of property within s. 38 (e), and that "salary or income" must be construed *ejusdem generis*, and consequently that such maintenance was not within the purview of the Act. Both these contentions were rejected. The learned judges in their judgments, and particularly Lord HANWORTH, M.R., reviewed the cases, but did not definitely formulate any definitions of income, though it is clear that they were of opinion that the term "income" was wider than "salary." ROMER, L.J., however (at p. 560), adopted the following passage: "In my opinion s. 90 [now 51] points to some definite annual

(t) [1891] 2 Q.B. 231.

(u) *Re Rogers*, [1894] 1 Q.B., at p. 430.

(a) *Elliot v. Clayton* (1851), 16 Q.B. 581.

(b) *Emden v. Carter* (1881), 17 Ch. D. 169, 768.

(c) *Re Roberts*, [1900] 1 Q.B. 122.

(d) [1934] Ch. 549.

(e) See *ante*, p. 157.

amount which is coming to the bankrupt." The following are illustrations of cases falling within the section: the pension of a retired colonial judge (f); the pay of an actor under a contract for two years (g); the salary of an Irish Member of Parliament (h); the pension of a police constable under the Police Pensions Act, 1921 (i).

(f) *Re Huggins* (1882), 21 Ch. D. 85.

(g) *Re Shine*, [1892] 1 Q.B. 522.

(h) *Hollinshead v. Hazleton*, [1916] 1 A.C. 428.

(i) *Re Garrett*, [1930] 2 Ch. 137.

CHAPTER 9

MANAGEMENT OF THE BANKRUPT'S PROPERTY

THE principal duty of the trustee is to get in the property, to receive proof of debts, and distribute the property in a proper proportion to those entitled to it. He has, however, some powers of managing the property in order that it may realise the greatest value for the benefit of the estate. Of these powers some may be exercised simply at the discretion of the trustee in bankruptcy (s. 55), others require the permission of the committee of inspection, if it exists (ss. 56, 57, 58, and see p. 108, *ante*).

POWERS IN THE DISCRETION OF THE TRUSTEE

The trustee may:—

- (1) Sell all or any part of the property of the bankrupt (including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt) by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels (Bankruptcy Act, s. 55 (1)).

“Trustee” here includes the Official Receiver, if there is an interval of time when there is no trustee appointed by the creditors (*a*).

The discretion of the trustee cannot be interfered with by individual creditors:

“There is no *locus standi* for any one creditor to interfere “and ask the Court to order a sale (or *vice versa*), except on “the ground that the trustee has not exercised his discretion “*bona fide*” (*b*).

In the same case JESSEL, M.R. (at p. 65), suggested that the Court would not interfere “unless the trustee is doing that

(a) *Turquand v. Board of Trade*, (1886), 11 App. Cas. 286.

(b) *Ex p Lloyd, Re Peters* (1882), 47 L. T. 64.

which is so utterly unreasonable and absurd that no reasonable man would so act."

Fiduciary Position of Trustee.—The trustee is in a fiduciary position and cannot sell to himself, nor can he sell to his own solicitor, nor apparently to the bankrupt's solicitor (*c*), because the bankrupt has an interest in the realisation of as large an estate as possible.

This rule is subject to the general equitable principle that the Court can give leave to sell to a person in a fiduciary position, though the Court would not allow the trustee himself to bid without a resolution of the general body of creditors, which, *semble*, must be unanimous (*d*).

The rule that a trustee cannot purchase without leave of the Court also applies to the committee of inspection (*dd*). If any sale is made contrary to this provision it may be set aside by the Court on the application of the Board of Trade or any creditor. The Court may sanction a sale to a nominee for an intended company, of which the trustee and committee of inspection are to be shareholders, if it is of opinion that it is for the benefit of the general body of creditors (*e*).

It has been held that in order to come within the prohibition of this rule it must be a purchase "directly or indirectly, by the trustee or member of the committee of inspection" (*f*).

In *Re Gallard* (*f*) a purchase was made by a partner of the trustee, out of his own moneys, and independently of the firm's property altogether:

Held, that it was not within the rule, though on the facts the purchase was at a fraudulent undervalue known to all parties and so set aside.

Sale to Bankrupt.—On the other hand, the sale may be made to the bankrupt himself, because there is nothing in the Act to prevent this (*g*). The case, in which this may occur, is in respect of the goodwill of a business of a personal nature. It was argued in the case cited that such a sale was impossible, because the property must be bought with money belonging to the trustee, and, in any event, that it would immediately

(*c*) *Luddy's Trustee v. Peard* (1886), 33 Ch. D. 500.

(*d*) *Ex p. Beaumont* (1834), 1 Mont. & A. 304.

(*dd*) B R. 347

(*e*) *Re Spink* (1911), 108 L.T. 572.

(*f*) *Re Gallard*, [1897] 2 Q.B. 8.

(*g*) *Kitson v. Hardwick* (1872), 1 L.R. 7 C.P. 473.

revest in the trustee. The answer was that the money might be personal earnings made after the adjudication, and, further, since the business would be acquired after adjudication, it could be carried on without the intervention of the trustee (*h*).

Sale of Goodwill.—If the goodwill of a business is sold to a stranger there is nothing to prevent the bankrupt from soliciting customers of the business, because he cannot be compelled to enter into a covenant, and the sale is *in invitum* (*i*). But he may be compelled to disclose a secret formula because it forms part of the assets or goodwill of the business, and hence within the definition of property contained in s. 167 (*k*).

- (2) Give receipts for any money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect of the application thereof (Bankruptcy Act, s. 55 (2)).

Where there is more than one trustee the receipt of one of them will suffice (*l*), unless the other has already expressed dissent (*m*).

- (3) Prove rank, claim, or draw a dividend in respect of any debt due to the bankrupt.
- (4) Exercise any powers, the capacity to exercise which is vested in the trustee under this Act, and execute any powers of attorney, deeds, and other instruments for the purpose of carrying into effect the provisions of this Act (Bankruptcy Act, s. 55 (3), (4)).

The powers exercisable by the bankrupt for his own benefit pass to the trustee under s. 38 (2) (*a*), except the right of nomination to an ecclesiastical benefice, but the powers conferred by the Settled Land Act, 1925, in respect of any land of which he is tenant for life or person with powers of tenant for life, will not pass to the trustee in bankruptcy (*n*).

(*h*) See *ante*, p. 222.

(*i*) *Walker v. Mottram* (1881), 19 Ch. D. 355.

(*k*) *Re Keene*, [1922] 2 Ch. 475.

(*l*) *Smith v. Jamesons* (1794), 1 Esp. 114.

(*m*) *Bristow v. Eastman* (1794), 1 Esp. 172.

(*n*) Settled Land Act, 1925, s. 104; see *ante*, p. 168.

- (5) Deal with any property to which the bankrupt is beneficially entitled as tenant in tail in the same manner as the bankrupt might have dealt with it (Bankruptcy Act, s. 55 (5)).

It is now possible to bar an entail without enrolling a deed (*o*) but, of course, the estate so vested is only equitable. Unless the trustee, by barring the entail, becomes the owner in fee simple absolute, freed from all the limitations of the settlement, he cannot acquire the legal estate (*p*).

By virtue of Bankruptcy Act, s. 59, the trustee may, after giving written notice, inspect any property held by way of pledge, pawn, or other security. In such circumstances the notice in writing will operate to prevent the owner of the pledge, etc., from realising his security until after the trustee has had a reasonable opportunity of inspecting the property, and deciding whether he will redeem it. Where, however, the property of the bankrupt is a copyright, the trustee may not deal with it in any way, as, for example, by sale of books, or performance of a play, without making provision for the payment of any royalties which may be due to the author, where he is not the debtor (*q*).

Where, for example, the debtor is a publisher owning copyright in books published by him, which are subject to royalties to be paid to the author, the trustee cannot publish without continuing to pay royalties, or sell the copyright to any other publisher except upon terms that he pays the royalties which may become due to the author in the same manner as under the original assignment.

POWERS TO BE EXERCISED ONLY WITH THE CONSENT OF THE COMMITTEE OF INSPECTION

Requirement of Consent.—If there is no committee of inspection, then the consent may be given by the Board of Trade on the application of the trustee (*r*). When the Official Receiver is acting as trustee he will be bound to get consent

(*o*) Law of Property Act, 1925, s. 133.

(*p*) Settled Land Act, 1925, s. 105

(*q*) B.A. s. 60.

(*r*) B A s 20 (10)

under s. 56 (s). This would also seem to be the case where there are less than three creditors (t).

The consent may not be general, but only to do a particular thing in a specified case or cases (u).

In *Re Vavasour* (u) the committee authorised the trustee to employ a solicitor "where necessary." The trustee employed a solicitor to fight an action, and the question arose how far he was entitled to do this. WRIGHT, J. (at p. 314), said:

"Then at the end (of the relevant section) come the words, 'The permission given for the purposes of this section shall not be a general permission. . . .' I find very great difficulty in dealing with these words. Some common sense must be introduced into them, and I should hesitate a long time before I held that it was necessary for a specific resolution to be passed for every step in an action. I do not think that can be the meaning. . . . I quite agree that the resolution may be so worded as to cover any number of proceedings or any number of pieces of business, but then, I think it must specify the particular matters. . . . I think the resolution must specify in some way or other the particular matter in which the solicitor may be employed, but here it does nothing of the sort."

Held, that the resolution was too general to be within the section.

In *Re Duncan* (a) a limit of £250 was put to the solicitor's bill. The bankruptcy was annulled, as the debts were paid in full:

Held, that no more than £250 could be paid out of the bankrupt's estate.

A written authority is not necessary for the purposes of the section (b), but the sanction must be obtained before the act is done, unless there is great urgency, and even in such a case it must be shown that no undue delay occurred (c).

The necessity for consent does not afford a defence to proceedings brought by a trustee. The provision is simply for the purposes of keeping down the expenses of administration, and consequently cannot be set up as a bar to a valid claim (d).

(s) *Re Duncan*, [1892] 1 Q.B. 331.

(t) *Re Geiger*, [1915] 1 K.B. 439.

(u) B.A. s. 56, and *Re Vavasour*, [1900] 2 Q.B. 309.

(a) [1892] 1 Q.B. 879.

(b) *Re Vavasour*, [1900] 2 Q.B., at p. 315.

(c) B.A. s. 83(3).

(d) *Re Branson*, [1914] 2 K.B. 701.

The principal powers of management are discussed hereafter, but the full list of powers with the consent of the committee is given earlier (e).

(1) Carry on the business of the bankrupt so far as may be necessary for the beneficial winding up of the same (Bankruptcy Act, s. 56 (1)).

If he does carry on the business he will have to comply with Bankruptcy Rules 337 and 348.

Rule 337 requires him to keep a distinct trading account, and the incorporation in the cash book of the total weekly amount of the receipts and payments for such trading accounts.

Rule 348 is directed against the trustee making a profit out of his trust, and also to prevent any member of the committee of inspection from deriving a personal benefit.

Hence the sanction of the Court is necessary to payments made to the trustee or committee of inspection for services rendered or goods supplied.

The bankrupt himself can be employed to carry on the trade or business for the benefit of the creditors (f), and be allowed what is necessary for the support of himself and his family, or an allowance in consideration of his services, if he is engaged in winding up the estate, but any such allowance may be reduced by the Court (g). This allowance, unless the creditors otherwise resolve, must be in money (h).

Section 55 only authorises the business to be carried on for the purposes of winding up the estate more beneficially. Hence, a majority of the creditors cannot authorise the trustee to carry on the business with a view to making a profit in defiance of the wishes of the minority (i).

(2) Bring, institute, or defend any action or other legal proceeding relating to the property of the bankrupt (Bankruptcy Act, s. 56 (2)).

If he does so, he must bring the action under his official title prescribed by s. 76 (*the trustee of the property of . . . a bankrupt*). Furthermore, it is provided by r. 123 that,

unless the action is especially assigned by the Judicature Act, 1873 (now Judicature Act, 1925), or other statute, to some

(e) See *ante*, p. 108.

(f) B.A. s. 57.

(g) B.A. s. 58.

(h) B.R. 370.

(i) *Ex p. Emmanuel* (1881), 17 Ch. D. 35.

division of the High Court, any action commenced in the High Court must be commenced in Bankruptcy and will be tried by the High Court judge assigned to bankruptcy.

The trustee need not continue an action commenced by the bankrupt prior to bankruptcy, and failure to do so will not prevent his commencing an action subsequently on his own behalf (*k*).

Of course, he will only be able to prosecute actions which pass to him in the bankruptcy (*l*). Furthermore, he may only be a party to an action which will be for the benefit of creditors generally, and not lend his name to proceedings on behalf of any particular creditor (*m*).

In *Ex p. Cooper* (*m*) an incumbrancer, wishing to make a claim based on fraudulent preference, employed the trustee's name:

Held, that the trustee's name should not have been used, unless the incumbrancer was prepared to deliver up the property for the benefit of creditors generally.

A trustee in bankruptcy is not subject to an order for security for costs merely on the ground of insolvent circumstances, because he is not a nominal plaintiff (*n*). If an undischarged bankrupt sues without the intervention of the trustee, on a claim arising subsequently to the adjudication, he is not for the like reason liable on that ground to an order for security for costs (*o*). *ESHR*, M.R., pointed out (*oo*) that the right of the trustee to take the property does not make a bankrupt a nominal plaintiff, since intervention might not take place.

(3) Employ a solicitor or other agent to take any proceedings or do any business which may be sanctioned by the committee of inspection (Bankruptcy Act, s. 56 (3)).

This provision appears to cover work which is not strictly professional work on the part of the solicitor, but if he is so employed by the trustee he cannot charge solicitor's charges; he is entitled only to what the taxing master regards as fair

(*k*) *Bennett v. Gamgee* (1877), 46 L.J. Ex. 204.

(*l*) See *ante*, p. 189.

(*m*) *Ex p. Cooper* (1878), 10 Ch. 313.

(*n*) *Cowell v. Taylor* (1885), 31 Ch. D. 34.

(*o*) *Cook v. Whellock* (1890), 24 Q.B.D. 658.

(*oo*) *Ibid.* at p. 661.

(*p*) *Re Pryor* (1888), 59 L.T. 256.

and reasonable (*p*). Where the solicitor's costs are to be taxed as against the trustee, they fall under that class of solicitor and client costs where there is a mixed fund, and not as against the solicitor's own client (*q*).

- (4) The trustee may appoint the bankrupt himself to superintend the management of the property of the bankrupt, or of any part thereof, or to carry on the trade (if any) of the bankrupt for the benefit of his creditors, and in any other respect to aid in administering the property in such manner and on such terms as the trustee may direct (Bankruptcy Act, s. 57).**

Should the bankrupt in carrying on the business do so in such a fashion that there is a considerable loss, and fresh debts incurred, this would result in a second bankruptcy.

In such circumstances the rights of the creditors in the first bankruptcy will be defined as in such a bankruptcy (*r*). Previously to the passing of the 1913 Act many cases had arisen upon the question of the priority of such creditors in the event of subsequent trading, but the matter has ceased to be of the same importance. It may, however, be well to point out that a creditor of the business carried on after the delegation to the bankrupt may at least claim his debt out of any assets in his hands, provided that he has obtained evidence that the trustee has authorised the trading (*s*).

A banker in *Ex p. Bolland* (*s*) made advances after the bankruptcy on the representation that the administration was in the hands of the debtor and where the trustee said, "The matter is quite out of my hands, and it will be all right." In the course of the dealings by the debtor a considerable sum was paid into the bank. The bank claimed to pay over to the trustee only the balance after deducting the advances made after the bankruptcy:

Held, that as the bank had only acted on the representation of the trustees, they had acted in good faith, and were entitled to retain as against the advances.

- (5) The trustee may make such allowance as he may think just to the bankrupt out of his property for the support of the bankrupt and his family,**

(q) *Re Lavey*, [1921] 1 K.B. 344.

(r) See *ante*, p. 229.

(s) *Ex p. Bolland*, [1878] 9 Ch. D. 312.

or in consideration of his services if he is engaged in winding up his estate, but any such allowance may be reduced by the court (Bankruptcy Act, s. 58).

The allowance must be in money (*t*)

Disclaimer of the Bankrupt's Property by the Trustee.—Disclaimer may be described as the statutory right given to the trustee to relieve the bankrupt's estate of liability for onerous contracts or covenants by repudiating them, leaving the party injured to prove in the bankruptcy for any loss thereby sustained.

Apparently operating as a great hardship upon the party injured, in point of fact it merely places him in the same position as other creditors. If the contract or covenant were not so repudiated, it would have to be performed in the whole and not in part. This would give a benefit to one form of creditor as against the remainder.

Disclaimer of Lease.—In the first place, disclaimer *in respect of a lease* cannot be exercised by the trustee without the leave of the Court, save in those cases expressly provided for by the Bankruptcy Rules (*u*). When giving leave the Court may impose upon the trustee such conditions, and make such orders as to fixtures, tenant's improvements, or other matters arising under the tenancy as it may think just.

Lord SELBOURNE, L.C., in *Re East and West India Dock Co.* (*a*), laid down the rule that the power given by the corresponding section in the Bankruptcy Act, 1869, was "to be exercised with a view to the administration in bankruptcy of the bankrupt's estate, and for the benefit of all the persons interested in that administration. Therefore, if in a particular case it appears clear that, *looking at that object alone*, the disclaimer ought to be allowed, the Court would be introducing considerations foreign to the purpose of the legislature if, for collateral reasons connected with the position of other persons, it should refuse to allow it."

In this case the trustee asked leave to disclaim a lease of which the debtor was assignee which he had also mortgaged. It was suggested that such a disclaimer might affect the rights of the lessor, and of the mortgagee:

(*t*) B R. 370.

(*a*) (1881), 17 Ch. D., at p. 764.

(*u*) B.A. s. 54 (3).

Held, on the principle above stated, that if it did so incidentally while relieving the bankrupt's property of onerous liabilities, the Court still ought to exercise its discretion in favour of the trustee's application (*b*).

As the Court has power to make such conditions as it thinks fit, this may include the payment of compensation to the lessor, but there have been no recent reported cases determining the principle. Probably it will depend upon whether the occupation of the premises was expected to be of profit to the bankrupt's estate (*c*).

Disclaimer of Lease without Leave.—The Bankruptcy Rule 276 has made provision for the disclaimer of a lease without leave of the Court, but only where either

(a) the bankrupt has not sublet or charged the premises; and either

(1) the rent reserved and real value of the property leased as ascertained by the property tax assessment are less than £20 per annum; or

(2) the estate is administered under s. 129 (2); or

(3) notice is served on the lessor, and within seven days he has not given notice to the trustee that the matter should be brought before the Court;

or (*b*) the bankrupt has sublet the demised premises or created a charge upon the lease and the trustee serves the lessor and the sublessee or the mortgagees with notice of his intention to disclaim, and neither the lessor nor the sublessee or the mortgagees within 14 days of the notice require the matter to be brought before the court.

Where notice is served on lessor or mortgagee he should always give such notice, if he requires compensation to be settled by the Court, because otherwise the Court cannot interfere (*d*).

(*b*) This appears to be inconsistent with the dictum of JAMES, L.J., in *Ex p. Buxton* (1880), 15 Ch. D. 289, that an equitable mortgagee would not be affected, but it is submitted that the decision does not go as far as this, but leaves the matter open. *Ex p. Buxton* was cited in argument in the case but not referred to in the judgment.

(*c*) Cf. *Ex p. Isherwood* (1882), 22 Ch. D. 384.

(*d*) *Re Sandwell* (1885), 14 Q.B.D. 960.

Disclaimer of other property without Leave.—Any other onerous property of the bankrupt can be disclaimed by the trustee. In order to do this he must file a written disclaimer signed by himself within twelve months of the first appointment of a trustee. Where the property has not come to his knowledge within one month, he may exercise his right to disclaim within twelve months of his first becoming aware of its existence. The Court can extend the time (*e*). An Official Receiver appointed on the release, removal, or resignation of a trustee can disclaim within twelve months of appointment or knowledge of the existence of the property, although the time for exercising disclaimer has expired (*f*).

The disclaimer does not become effective until it is filed (*g*).

Although the trustee normally has the period of one year in which to decide, actually any person interested in the property can serve a notice in writing on the trustee requiring him to disclaim within twenty-eight days after receipt of the notice, or within such further period as the Court may allow, and this he must do or his right to disclaim will cease, and in the case of a contract he will be deemed to have adopted it (*h*).

What Property can be Disclaimed.—It has been held that property in this connection does not mean that property which is divisible among the bankrupt's creditors, but his property within the definition of s. 167. This includes

money, goods, things in action, land, and every description of property, whether real or personal, and whether situate in England or elsewhere; also obligations, easements, and every description of estate interest and profit, present or future, vested or contingent, arising out of or incident to property as defined.

Although the section deals with the property, it is necessary that, in order to disclaim it, it should be subject to onerous liabilities (*i*).

In *Re Gee* (*i*) a debtor, who was a lessee, had prior to his bankruptcy assigned the lease by way of mortgage, leaving

(*e*) B.A. s. 54 (1).

(*g*) B.R. 276 (3).

(*i*) *Re Gee* (1889), 24 Q.B.D. 65.

(*f*) B.A. s. 54 (8).

(*h*) B.A. s. 54 (4).

vested in him only an equity of redemption. Under the then law (k) the owner of an equity of redemption was not liable to the lessor on the covenants in the lease:

Held, that the trustee could not disclaim the lease, because although if he redeemed he would be liable on the covenants, yet he was not bound to redeem, and therefore the property was not subject to onerous covenants.

Where the property is subject to onerous liabilities it can be disclaimed, although not divisible between the creditors (l).

In *Re Maughan* (l) the bankrupt had an agreement for a lease which he had agreed to assign before the bankruptcy, but had not done so. This agreement for a lease the Court held to be of the same effect as a lease. The assignee had agreed to release his right, and the trustee wished to disclaim:

Held, that the trustee had an onerous property in that at the time he was liable on the lease. If he had not disclaimed he would have been bound to assign to the other party and so not divide, yet he could still (with the assignee's assent) disclaim.

Section 54 (1) mentions the property which can be disclaimed in the following terms:

- (1) Land of any tenure burdened with onerous covenants (this is wider than leaseholds);
- (2) Shares and stocks in companies;
- (3) Unprofitable contracts; and
- (4) Any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of some onerous act, or to the payment of a sum of money.

These cases appear, however, merely to specify the property comprised in the broad principles already mentioned.

Effect of Disclaimer.—The effect of disclaiming property must be considered from the aspect of three parties:

- (a) the trustee;
- (b) the bankrupt; and
- (c) other persons interested in the property.

(k) By virtue of Law of Property Act, 1925, s. 86, such a mortgage would be by way of underlease and not assignment, and, therefore, the debtor would be liable on the covenants in the head lease.

(l) *Re Maughan* (1885), 14 Q.B.D. 956.

(a) *Trustee Relieved from Liability*.—The trustee is relieved from all personal liability in respect of the property as from the date in which it vested in him (m).

This statutory provision is, however, designed only to cover those liabilities which are imposed automatically by the vesting of the property, as, for example, the payment of rent. Where the trustee voluntarily incurs a liability he will not be relieved (n). Here a trustee had entered into the occupation of the premises, and taken possession of the bankrupt's furniture. It was held by the Court of Appeal that as the rates were incurred by the voluntary occupation, therefore he remained liable despite the disclaimer.

ATKIN, L.J., in *Re Lister* (n) (at p. 163), said:

"It is not necessary, and perhaps inadvisable, to discuss 'what the precise scope of the words in sub-s. (2) is. 'They 'plainly cover liabilities necessarily imposed by the vesting of 'the property disclaimed, such as liability to perform the 'covenants of a lease, to pay calls on shares, or to give or pay 'for delivery of goods on contracts. There may be liabilities 'which directly flow from the property when vested which 'would also be covered. But they do not cover liabilities which 'the trustee voluntarily incurs, even though in doing so he 'is acting with prudence and in fulfilment of his duties to the 'estate.'"

(b) *Rights, etc., of Bankrupt Determined*. Disclaimer likewise operates to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed.

The effect of making disclaimer only operate from its date in relation to the bankrupt's property appears to be the result of difficulties arising from relating it back to adjudication (o). Apparently up to the date of disclaimer the landlord is entitled to rent and performance of covenants, but after that date he cannot claim for either (p), subject to what is said hereafter about proof in the bankruptcy.

(c) *Other Parties Retain Status Quo*.—So far as concerns other parties the Act aims at maintaining the *status quo* so far as possible. It provides that the disclaimer

(m) B.A. s. 54 (2).

(o) *Ex p. Glegg* (1881), 19 Ch. D. 7.

(p) *Stacey v. Hill*, [1901] 1 K.B. 660.

(n) *Re Lister*, [1926] 1 Ch. 149.

shall not, except so far as is necessary for the purpose of releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

This must involve some alterations in the rights and liabilities of third parties, if without such change it is impossible to release the debtor.

This is well illustrated in *Stacey v. Hill* (q), where a debtor's trustee disclaimed a lease in which there was a guarantee by a third party that the rent should be paid. It was held that the third party was also released, because otherwise he could claim in the bankruptcy in respect of any payments so made.

A. L. SMITH, M.R., stated the law (at p. 663), as follows:

" . . . in my opinion the question in this case is really concluded
 "by the judgment of this Court in *Re Finley, Ex p. Clothworkers*
 "Co. (r). The Court had in that case to determine the meaning
 "in s. 55 (2) of the Bankruptcy Act, 1883 (the corresponding
 "words). . . . LINDLEY, L.J., said in delivering the judgment
 "of the Court: 'Now the operation of these clauses in the simple
 "'case of a lease is not very difficult to ascertain. If there is
 "'nothing more than a lease, and the lessee becomes bankrupt,
 "'the disclaimer determines his interest in the lease under
 "'sub-s. (2). He gets rid of all his liabilities, and he loses
 "'all his rights by virtue of the disclaimer. There is no need
 "'of any provision for vesting the property in the landlord,
 "'but the natural and legal effect of sub-s. (2) is that the
 "'reversion will become accelerated.' In other words, the
 "'effect of the subsection is that in such a case the lease is put
 "'an end to altogether as between the lessor and the bankrupt
 "'lessee, the intention being that the bankrupt shall be altogether
 "'freed from any obligation arising under or in relation to it;
 "'and consequently no other person being interested in the lease
 "'it ceases to exist. As the lease is determined, no rent can,
 "'subsequently to the disclaimer, become due under it; the
 "'reversion on the term is in effect accelerated; and the lessor
 "'gets back his property, and can let it to another tenant, for
 "'aught I know, at a higher rent. . . . If the surety is liable
 "'to pay rent *in futuro* on his guarantee, he would be entitled
 "'to indemnity against the bankrupt or his property. It is,
 "'therefore, necessary, in order to release the bankrupt and
 "'his property, that the words at the end of the subsection
 "'should be brought into play in such a case."

(q) [1901] 1 K.B. 660.

(r) (1888), 21 Q.B.D. 475.

If, however, a bankrupt had sublet his property, then the disclaimer could not affect the sub-lease, because this property has already passed from the debtor (s), but the sub-lessee must observe and perform the covenants in the head lease, or else the landlord could forfeit the lease in the same circumstances as he could have done had it been still subsisting (t). In practice, however, the sub-lessee would obtain a vesting order.

Vesting Orders.—Section 54 (6) provides that

any person claiming any interest in any property which is disclaimed, or under any liability which is not discharged by disclaimer, may apply to the Court for an order vesting the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability, or a trustee for him, and upon such terms as the Court may think fit.

If any such order is made the property vests without any conveyance or assignment. Notice of application for such an order need only be given to such persons as the Court directs (u).

In respect of leasehold property there is a lengthy proviso to this provision for a vesting order which concerns sub-lessees and mortgagees of the leasehold interest. Its object appears to be twofold:

First, to compel sub-lessees or mortgagees who take advantage of a vesting order to do so

- (a) upon the terms that the lessee or mortgagee shall be subject to the same liabilities as the bankrupt under the lease at the date when the bankruptcy petition was filed; or
- (b) if the Court thinks fit, as if the sub-lessee or mortgagee had taken an assignment of the lease at that date.

In either event the order will operate if necessary as though the lease only comprised the property the subject-matter of the order.

Secondly, to compel in certain circumstances a sub-lessee or mortgagee to take such an order upon the penalty of losing his interest in the property. If the sub-lessee or mortgagee declines

(s) *Smalley v. Hardinge* (1881), 7 Q.B.D. 525.

(t) *Re Levy* (1881), 17 Ch. D. 746.

(u) *Re Baker*, [1901] 2 K.B. 628.

a vesting order the Court has power to vest the bankrupt's estate and interest in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt. It will be noticed that the power of the Court to make such an order is dependent upon the existence of a person who is liable to perform the covenants in the lease. Such a case would exist where the bankrupt was an assignee of the lease from a lessee who remained personally liable on the covenants.

Right to Prove for Damages.—Any person who is injured by the disclaimer of the trustee may prove as a debt in the bankruptcy to the extent of the injury suffered by the disclaimer (*a*).

For example, where the trustee disclaims partly paid-up shares the Company can prove in the bankruptcy for the amount remaining unpaid. If, however, the Company obtains any benefit by the disclaimer, *e.g.* from the capital already received, this must be set off against the amount unpaid (*b*).

Rescission of Contracts.—Analogous to disclaimer the Court has power to order the rescission of any contract on such terms as to payment by or to either party for the non-performance of the contract, or otherwise, as to the Court seems equitable. Any damages so payable may be proved as a debt in the bankruptcy (*c*).

(*a*) B A. s. 54 (8).

(*c*) B.A. s. 54 (5).

(*b*) *Re Hallett* (1894), 70 L.T. 408.

CHAPTER 10

PROOF OF DEBTS

IN order that a creditor may benefit out of the property vested in the trustee in bankruptcy he must in the normal course prove his debt. This is his formal claim to receive a dividend out of the property or the proceeds thereof.

The method of making this proof is governed by the Bankruptcy Act, s. 32, Sched. II, and the Bankruptcy Rules (rr. 250-263), only some of the more important provisions of which can be noticed here.

Method of Proving Debts.—The proof should be made as soon as may be after the receiving order (*a*). It is made by an affidavit sworn by the creditor, or an authorised person for him, which sets out the account and specifies the vouchers (if any) by which it can be substantiated (*b*). The creditor must deduct all trade discounts, but need not deduct any discount not exceeding 5 per cent on the net amount of his claim, which he may have agreed to allow for cash (*c*). He must also state whether or not he is a secured creditor (*d*).

This proof will be examined by the trustee, who must give notice in writing admitting or rejecting the proof in whole or in part. In the alternative he may require further evidence in support of it (*e*).

This notice must be given, in the case of an Official Receiver acting as trustee, within fourteen days from the latest date specified in the notice of his intention to declare a dividend as the time within which proofs must be lodged (*f*) and in the case of any other trustee, within twenty-eight days after receiving a proof which has not previously been dealt with by the Official Receiver; but where the trustee has given notice of his intention to declare a dividend, the notice admitting or rejecting the proof or requiring further evidence must be given within fourteen days after the date by which proofs must be lodged (*g*).

If the trustee thinks that a proof has been improperly admitted, he may apply to the Court to expunge the proof or

(*a*) B.A. Sched. II (1).

(*c*) B.A. Sched. II (8).

(*e*) B.A. Sched. II (23).

(*g*) B.R. 260.

(*b*) B.A. Sched. II (2), (3) and (4).

(*d*) B.A. Sched. II (5).

(*f*) B.R. 259.

reduce its amount (*h*), and a creditor dissatisfied with the rejection of a proof may apply to the Court to reverse or vary the decision (*i*). A creditor may apply to the Court, if the trustee declines to interfere, to reduce or expunge the proof of another creditor (*k*). Likewise in the case of a composition or scheme of arrangement, the debtor himself may apply to the Court (*k*).

A trustee in bankruptcy should refuse to deal with an affidavit of proof of debt against the estate until it is properly stamped (*l*). When an unstamped proof of debt in respect whereof a fee is payable is received by a trustee, it is his duty to point out to the creditor that he has omitted to affix to the bankruptcy stamp, value 1s. 6d., and to inform him that, in the absence of the stamp, the proof cannot be dealt with as a proof of debt against the estate (*m*).

Secured Creditors.—A secured creditor is defined (*n*) as “a person holding a mortgage, charge or lien on the property of the debtor or any part thereof, as a security for a debt due to him from the debtor.”

Proof of Secured Creditor.—Since a secured creditor has property vested in him out of which he may pay himself his debt he need not trouble to prove at all. Subject to the rules for swelling the assets already considered (*o*), his interest in the security will not pass to the trustee in bankruptcy, because his interest did not form part of the debtor's property. Consequently it is open to him to deal with the security as if no bankruptcy had taken place, but any rights which [†]the debtor formerly had will be vested in the trustee in bankruptcy. In other words, the position would be similar to that which would arise if the debtor had assigned to the trustee his interest in the security. An assignee would not, as such, be personally liable to pay the debt, nor will the debtor, but any personal remedy must be enforced by way of proof in the bankruptcy.

If the creditor decides to make proof, he has certain alternatives, non-compliance with which will prevent his sharing in any dividend (*p*).

(*h*) B.A. Sched. II (24).

(*i*) B.A. Sched. II (25).

(*k*) B.A. Sched. II (26)

(*l*) *Per* CLAUSON, J., in *In re Brown; Boriani v. Trustee* (1933), 103 L.J. Ch. 105.

(*m*) Direction given on 15 December, 1933, by the Judges exercising the Bankruptcy jurisdiction of the High Court.

(*n*) B.A. s. 167.

(*o*) *Ante*, Chaps. 6 and 8.

(*p*) B.A. Sched. II (17)

- (1) HE MAY SURRENDER HIS SECURITY TO THE TRUSTEE FOR THE BENEFIT OF CREDITORS GENERALLY, AND PROVE FOR THE WHOLE OF HIS DEBT (q).

By doing this the secured creditor puts himself in the position of an unsecured creditor, and consequently this is not the usual course to pursue. If, however, a creditor proves without mentioning that he is secured, as is required in the affidavit of proof, he will be compelled to surrender his security, unless he can satisfy the Court that the omission was by inadvertence. The Court has power in that case to allow the proof to be amended upon such terms, as to the repayment of any dividends or otherwise, as it thinks just (r). In the case of *In re Small; Westminster Bank Limited v. Trustee* (s), the Court exercised its jurisdiction to grant relief, although the petition had been presented and proof of debt has been made in 1927, and the application to amend was not made until 1934. It was held that the omission to mention the security was due to honest inadvertence, and that no substantial injustice would be done by acceding to the application. It was pointed out, however, that if, in the case of a petitioning creditor, there were any doubt as to whether, after deducting the value of the security, the amount of the debt would be sufficient to support the petition, the Court would hesitate long before permitting an amendment.

- (2) HE MAY REALISE HIS SECURITY AND PROVE FOR THE BALANCE OF THE DEBT DUE TO HIM AFTER DEDUCTING THE NET AMOUNT REALISED (t).

This means the balance of the debt for principal and interest accrued due at the date of the receiving order. No allowance is made for interest after that date, and the sum realised cannot be used in payment of any such interest (u). This rule is in pursuance of the policy of s. 7 (2) of the Bankruptcy Act, which expressly preserves to a secured creditor the right to exercise any power to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if that section had not been passed. This would seem to entitle the secured creditor to apply for foreclosure, though

(q) B.A. Sched. II (11).

(r) B.A. Sched. II (5) as amended by B.A. 1926, s. 11.

(s) [1934] Ch. 541.

(t) B.A. Sched. II (10).

(u) *Quartermaine's Case*, [1892] 1 Ch. 639.

probably an order for sale would be made if that course would benefit the estate generally (v).

Certain rules are laid down governing the accounts of such a realisation (w), and under these rules a secured creditor, who has no right to realise his security apart from an application to the Court (*e.g.* in the case of an equitable charge) can apply to the Court for an order directing a sale (x). In such a case the sale will normally be carried out by the trustee in bankruptcy with such other persons joining as the Court shall direct.

- (3) HE MAY STATE IN HIS PROOF THE PARTICULARS OF HIS SECURITY, THE DATE WHEN IT WAS GIVEN, AND THE VALUE AT WHICH HE ASSESSES IT, AND PROVE FOR THE BALANCE (y).

It will be remembered that under the Bankruptcy Act, s. 4 (2), a secured creditor who petitions must either state that he is willing to give up his security for the benefit of the creditors or value his security before petitioning, and if this is a real estimate the Court will not take into account its correctness.

If the latter course is adopted, the trustee can at any time redeem the security at the valuation given, or, if dissatisfied, can demand a sale upon such terms as the creditor and trustee may agree, or as, in default of such agreement, the Court may direct (z). It is, however, open to the creditor to serve written notice upon the trustee, requiring him to elect within six months (zz) whether or not he will redeem. Failure to give written notice of such election to redeem will operate to vest the property in the secured creditor free from any equity of redemption or any other interest in the property comprised in the security which is vested in the trustee; and the amount of the debt is reduced by the amount at which the security has been valued (a).

(v) *Vide White v. Simmons* (1881), L.R. 6 Ch. 555.

(w) *Vide B.R.R.* 75-79.

(x) B.R. 75.

(y) B.A. Sched. II (12).

(z) B.A. Sched. II (13).

(zz) The time may be extended by the Court upon such terms as it may think fit (B.A. s. 109 (4)); but an appeal against a refusal of the Court to extend the time must be brought within 21 days from the date of refusal, and not from the date when the order is drawn up, even though the order may deal with the question of the payment of the costs of the application: *In re Bulmer; Trustee and Inland Revenue Commissioners v. National Provincial Bank Limited*, [1936] 3 All E.R. 366.

(a) *Re Smith and Logan* (1895), 72 L.T. 362.

In valuing his securities a secured creditor can "lump together" various debts and securities (a), and if he does so, and the trustee fails to give notice of election to redeem, then the securities will vest in the creditor (a). On the other hand, it would appear that the trustee can demand a separate valuation in respect of any security, at least where there are different securities and rights against third parties (b). Furthermore, it would appear that in any case the trustee may not redeem the securities in a "lump" without first ensuring that he is not allowing a security of greater value to be utilised as payment for a debt charged on a security which is, in fact, insufficient.

As BUCKLEY, L.J., put it in *Re Pearce's Trusts* (No. 1) (c):

"Now it has been contended before us that, somehow or other, a trustee in bankruptcy is entitled to do this: that if a creditor has a small debt charged upon a property of large value and has a large debt charged upon property of small value and has no right to consolidate, the trustee may allow him to prove for one aggregate sum, stating that he holds one aggregate security, and thus give him the benefit of consolidation so as to take the unsecured balance of a large debt out of the surplus value of the security for the small debt. I am not aware of any authority for that proposition; it seems to me an extraordinary one that the trustee should be entitled to create a right in the secured creditor adversely to other creditors for a security which he had not before the date of the bankruptcy."

If the creditor has made a mistake in his valuation he may amend at any time on showing to the satisfaction of the trustee or the Court that the valuation and proof were made *bonâ fide* on a mistaken estimate or that the security has diminished or increased in value since its previous valuation. Unless the trustee allows the amendment without application to the Court, it will be at the cost of the creditor and upon such terms as the Court may order (d).

The amendment being received, consequential changes will be made, but any dividend declared before the amendment shall not be disturbed, subject to the requirement that the creditor must repay any surplus dividend which he has received in excess of that to which he would have been entitled on the amended valuation (e).

(a) *Re Smith and Logan*, ante, p. 258.

(b) *Re Morris*, [1899] 1 Ch. 485.

(c) [1909] 2 Ch. 492, at p. 499.

(d) B.A. Sched. II (14).

(e) B.A. Sched. II (15).

It seems that a secured creditor who has valued his security for the purposes of making it a petitioning debt will not be allowed to alter his estimate, except *perhaps* in the case of *bonâ fide* mistake in value, nor will the Court go behind the estimate (f). In *Re Button*, VAUGHAN WILLIAMS, L.J. (with whose judgment ROMER, L.J., concurred), said (g): "He (the secured creditor) cannot take any benefit in the administration in bankruptcy except on the basis of that estimate. I very much doubt whether he ought in any circumstances to be allowed to amend his valuation. . . . In my opinion, where one arrives at the conclusion that the estimate is real and not a sham, we ought not to go into the question what is the true value after the declaration of the estimated value."

In the earlier case of *Re Vautin* (h), WRIGHT, J., had held that a trustee could not insist upon redeeming a secured creditor (who was the petitioner but had not proved his debt) on the basis of the declaration of value for the purpose of the petition, and this still seems to be law.

In any event, a secured creditor may not receive more than 20s. in the £ and appropriate interest, subject, of course, to anything that he may acquire under Sched. II (13) of the Bankruptcy Act (i) if the trustee fails to redeem and the creditor obtains his security free from the equity of redemption (k).

Examples of Secured Creditors.—The following creditors (*inter alia*) come within the definition of "secured creditor" (l):

- (1) Creditors who have issued execution which has been "completed" (as defined in s. 40) before a receiving order has been made and without notice of any petition or available act of bankruptcy (m).
- (2) Plaintiffs in actions in which money has been paid into Court, in respect of such money.
- (3) Mortgagees.

(1) *Creditors Who Have Issued Execution.*

Section 40 of the Bankruptcy Act provides that where a creditor has issued execution he shall not be entitled to retain the benefit

(f) *Re Button*, [1905] 1 K.B. 602.

(h) [1899] 2 Q.B. 549.

(k) B.A. Sched. II (18).

(m) *Vide ante*, p. 86.

(g) [1905] 1 K.B. 602, at p. 605.

(i) *Vide ante*, p. 258.

(l) *Ante*, p. 256.

of the execution against the trustee in bankruptcy of the debtor unless he has completed the execution before the date of the receiving order and before notice of the presentation of any bankruptcy petition or of the commission of any available act of bankruptcy (*m*); and the section declares that for the purposes of the Act an execution against goods is completed by seizure and sale.

Much difficulty has been occasioned by certain conflicting decisions and by the construction put upon the words "the benefit of the execution" (*n*). It was formerly held that these words meant the fruits of the execution and that the trustee in bankruptcy could compel the judgment creditor to repay any sums received either in full or in part discharge of the judgment debt in every case in which there was no seizure and sale of the debtor's goods. There were contrary decisions of the High Court (*o*), but the matter was finally settled by the decision of the Court of Appeal (composed of WRIGHT, M. R., and ROMER and GREENE, L.JJ.) in the case of *In re Andrew; ex parte Official Receiver* (*p*). In this case it was held that the words "the benefit of the execution" do not refer to moneys received in whole or in partial satisfaction by a creditor who has levied execution, but refer to the protection or charge which the creditor obtains by the issue of the execution. If the debt has only been partially discharged before the making of a receiving order, the "benefit of the execution" can only refer to the charge still remaining under the execution (if it has been kept on foot) for the balance of the debt. It therefore follows that sums paid in partial satisfaction before the date of a receiving order and without notice of a petition or available act of bankruptcy can be retained by the judgment creditor as against the trustee in bankruptcy.

(2) *Plaintiffs in Actions in which Money has been paid into Court.*—It is immaterial whether the money has been paid into Court with or without a denial of liability (*q*); the plaintiff will be a secured creditor to the extent of the payment into Court, and if, without taking the money out of Court, he presents a petition in bankruptcy, he must mention

(*m*) *Vide ante*, p. 86.

(*n*) *Vide In re Brailsford*, [1932] 1 Ch. 24 and *In re Kern*, [1932] 1 Ch. 555; now overruled by *In re Andrew*, [1937] Ch. 122.

(*o*) *Vide In re Godwin*, [1935] Ch. 213 and *In re Samuels*, [1935] Ch. 341.

(*p*) [1937] Ch. 122.

(*q*) *In re Debtor; ex parte Petitioning Creditors* (No. 5 of 1932), 101 L.J. Ch. 372.

the security, otherwise the petition will be dismissed. Thus in *In Re Debtor; ex parte Petitioning Creditors* (r) a writ was issued and the debtor entered an appearance and paid £12 into Court. The plaintiffs refused to take the money out of Court and signed judgment for £43 13s. 11d. and costs, which were subsequently taxed at £11 5s., making a total of £54 18s. 11d. On the debtor's failure to comply with a bankruptcy notice in respect of this debt, the plaintiffs presented a petition in bankruptcy, which the debtor opposed. It was held by a Divisional Court, consisting of LUXMOORE and FARWELL, JJ., that the plaintiffs were secured creditors, and as they had stated in their petition their willingness to give up their security for the benefit of the creditors generally and had not valued their security, the Registrar was right in refusing to make a receiving order.

(3) *Mortgagees.*

Assignment of Expectancies.—With regard to mortgages, the chief difficulty arises when they are by way of the so-called assignment of after-acquired personal property. At common law such an assignment did not operate to pass any proprietary rights to the creditor who, in order to obtain a title to the property, had to seize the chattels. But in equity, on the other hand, the beneficial interest in after-acquired property was held to be transferred in accordance with the contract to transfer (the so-called assignment) if the parties really intended this. Therefore, where a mortgagee's *equitable* title is perfected before an available act of bankruptcy committed by the mortgagor, his title will be good as against the trustee in bankruptcy. In such a case the mortgagee is actually a secured creditor, but, where his title is not good as against the trustee in bankruptcy, the trustee takes the property and the mortgagee is only entitled to the rights of an unsecured creditor.

Thus, in the case of *Tailby v. Official Receiver* (s), A. assigned by way of mortgage (*inter alia*) all book debts then due or which might thereafter become due to him. Subsequently B. & Co. became indebted to A., and he then became bankrupt.

It was held that, notwithstanding the wide terms of the assignment, by which all debts due to A. not only in respect of one particular business but generally, were assigned, the assignment was valid, and that the appellant who claimed under

(r) 101 L.J. Ch. 372.

(s) (1888), 13 App. Cas. 523.

the mortgagee, and had given notice to the debtors and so perfected his assignment, was entitled to retain the debt as against A's trustee in bankruptcy.

Such title will be perfected when the mortgagor acquires a title to the property which he has contracted to transfer or when the contract itself deals with debts then due but not payable until a future time, as, for example, instalments due under a hire-purchase agreement.

The following cases may be taken to illustrate the principles governing the application of bankruptcy to expectancies.

In re Reis (t) was a case where there was a marriage settlement under which the husband covenanted to transfer after-acquired property to the trustees to be held on the trusts of the settlement. In 1901 he purchased a house and furniture, and resided in the house with his wife and family until 1903. In May of that year he gave notice to his Stock Exchange creditors that he would have difficulty in paying them, and they closed their accounts with him. On June 10, 1903, the husband, in pursuance of a notice received from the trustees of the marriage settlement, transferred by deed his house and furniture to them. He committed an act of bankruptcy on June 25, and a receiving order was made on July 15.

It was held that the trustees' title was good, since it was perfected before an act of bankruptcy was committed. It should be observed that the deed assigning the furniture did not require registration as a bill of sale, notwithstanding the fact that the furniture remained in the possession of the husband, since it is to be regarded as part and parcel of the marriage settlement. It was executed in pursuance of a covenant in the marriage settlement, and was in the nature of a further assurance.

In re Magnus (u) deals with the case where there is no deed transferring the furniture. Under a marriage settlement a husband covenanted to transfer to the trustees any household effects purchased by him during the life of his wife to be held upon the trusts of the settlement. The husband and wife eventually went to live in a large house, and remained there with their family until the husband became bankrupt. From time to time the husband had purchased furniture, and when he went to this house he purchased a large quantity of furniture

(t) [1904] 2 K.B. 769, C.A.

(u) [1910] 2 K.B. 1049, C.A.

which was used there. There was no deed transferring the furniture, but the sole acting trustee was in the habit of visiting at the house, and saw the furniture there.

It was held by the Court of Appeal that the property was "actually transferred" within the meaning of the Bankruptcy Law before the commission of an act of bankruptcy. As FARWELL, L.J., said (*v*):

"The words 'actually transferred' must be read with reference to the subject-matter of the transfer. If it is land, a deed is required; if it is furniture or chattels, they pass by delivery. Test it in this way. The covenant in question by the husband relates only to plate, linen, china, chattels, or household effects. Assuming that the husband, at various times during the year—say, fifteen or twenty times—buys fresh chattels, is the trustee bound or even entitled to go to him on each occasion and say, 'You have bought a table, be good enough to execute a bill of sale of it to me'?

"Could the trustee properly bring actions to compel the execution of twelve or fifteen deeds of transfer, so as to vest the various chattels bought from time to time in him?

"Such transfers serve no useful purpose; for he it observed that this deed, if it is executed, does not require registration. The suggestion is, either that the trustee should go arm-in-arm with the purchaser in each case and direct the property to be transferred to the house, or that these useless deeds of transfer should be executed and expense incurred on each occasion. In this case the property went to the right people; it was held by the *cestuis que trust* in accordance with the trusts of the settlement, and it was, in the eye of the law, in the possession of the trustee."

In re Davis & Co. (*w*) was a case of instalments becoming due under a hire-purchase agreement. In 1886 F. lent Davis & Co. £1,000 upon the security of certain hiring agreements, and Davis & Co. assigned to F. all their right or interest in the hire agreements. F. gave notice to the hirers, and subsequently Davis & Co. were adjudicated bankrupts. It was argued on behalf of the trustee in bankruptcy that the instalments which became due from the hirers after the bankruptcy were not capable of being validly assigned.

It was held by the Court of Appeal, composed of Lord ESHER, M.R., and FRY and LOPES, L.JJ., that the instalments were validly assigned. That which was assigned was a

(*v*) At p. 1055.

(*w*) (1889), 22 Q.B.D. 193.

debt due at the date of the assignment, though it was not payable until a future time (x).

It should be observed, however, that if notice of the assignment has not been given to the hirer, payments under an agreement determinable by the hirer at any time which are not due at the date of the owner's bankruptcy are "debts . . . growing due" within the meaning of Section 38 (c) of the Bankruptcy Act, and pass to the trustee in bankruptcy (y).

With regard to the assignment of personal property the provisions of the Bills of Sale Acts, 1878 and 1882, must be borne in mind. If, however, the grantee under a Bill of Sale takes possession of the goods, his legal right to their possession is complete and good against the world, although as between himself and the grantor the relationship of mortgagor and mortgagee may still be subsisting. Thus in *In re Tooth* (z) a bill of sale was given to secure £200 and interest at 35 per cent. It was duly registered on 12th May, 1921, and re-registered (before the expiration of five years) on 7th May, 1926. On the 28th December, 1926, when £173 was owing, the grantor's son paid the debt and took a transfer of the bill of sale. No further registration was effected, but the transferee took possession of all the goods and removed some of them, leaving the rest at the grantor's house for the use of the grantor's wife and other children. The grantor was subsequently adjudicated bankrupt, and his trustee claimed the goods on the ground that the bill of sale had not again been re-registered as required by Section 8 of the Bills of Sale Act, 1882, and Section 11 of the Bills of Sale Act, 1878. It was held that as the transferee had in fact taken possession of the goods, re-registration was unnecessary and the goods did not pass to the trustee in bankruptcy of the grantor.

DEBTS WHICH ARE PROVABLE

All debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, are provable in bankruptcy (a).

(x) *Per* FRY, L.J., at p. 199.

(y) *Blakey v. Trustees of the Property of Pendlebury*, [1931] 2 Ch. 255; followed in *Latham v. Goldsbury*, [1933] 1 K.B. 844.

(z) [1934] Ch. 616.

(a) B.A. s. 30 (3).

Statutory Exceptions.

- (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust (*b*).

This means that a claim for damages in respect of a civil wrong or tort will not be provable unless the damages have been liquidated before the bankruptcy by a judgment assessing them or by agreement. As an example of the liquidation of damages for tort before bankruptcy, the case of *Ex p. Mumford* (*c*) may be cited. The debtor was the defendant in an action for seduction of the plaintiff's daughter. When the action had nearly proceeded to judgment it was compromised, and the debtor gave three promissory notes; one was paid, but before the others were due the debtor became a bankrupt.

It was held that the damages had been properly liquidated and that the sums secured by the two later promissory notes constituted a debt which could be proved in the bankruptcy.

If, on the other hand, the claim arises from a contract, it is provable notwithstanding that it is unliquidated and notwithstanding that the claim might also have been made in tort.

Thus in *Re Hopkins, Ex p. de Stedingk* (*d*) S. stored goods with H., and then H. sold the goods. S. brought an action against H. for trover, conversion and detainue, *i.e.* she sued in tort. Before judgment a receiving order was made against H. S. obtained judgment. S. then claimed to prove in the bankruptcy for breach of contract. The trustee rejected her proof.

The Court of Appeal, composed of WILLIAMS, ROMER and STIRLING, L.JJ. (reversing WRIGHT, J.), allowed her appeal, provided she abandoned the judgment and gave an undertaking to stay all further proceedings under it.

- (2) Debts or liabilities contracted by the debtor with any person after such person has notice of an available act of bankruptcy (*e*); unless they are protected under s. 46 (*f*).
- (3) Debts or liabilities in respect of which the Court has made an order that the value is incapable of being fairly estimated (*g*).

Other Exceptions.—In addition, there are certain debts or obligations which are not provable in bankruptcy because they

(*b*) B.A. s. 30 (1).

(*d*) (1902), 86 L.T. 676.

(*f*) *Vide* p. 145.

(*c*) (1808), 15 Ves. 289.

(*e*) B.A. s. 30 (2).

(*g*) B.A. s. 30 (6).

are of such a kind that the policy of the law does not allow creditors to sue on them, and consequently does not give them any further rights with regard to recovery of such debts in the event of the debtor's bankruptcy. Amongst these may be mentioned the following:

(1) *Debts incurred in respect of an illegal or immoral consideration.*

Probably the most important class of debts which fall within this description consists of debts incurred by way of gaming or wagering.

(2) *Debts not supported by consideration and not arising by means of a document under seal.*

Since a purely voluntary promise to pay money or transfer property cannot be sued on, the promisee cannot prove in bankruptcy either for the debt or for damages for breach of contract. If, however, the promise is contained in a deed, *i.e.* a document under seal, the promisee may sue or prove in bankruptcy notwithstanding the absence of consideration (*h*).

In the case of a bond conditioned to secure the performance of certain acts, the amount for which the creditor may prove will usually be the amount of the actual damage sustained and not the penal sum, even though the penal sum be expressed to be "liquidated damages and not a penalty," unless the Court regards the penal sum as a fair pre-estimate of the damage likely to be incurred.

It should be pointed out that the Court will inquire into the existence or adequacy of consideration in the case of any debt which it is sought to prove in bankruptcy, and if there is no debt in equity the proof will be rejected. This is so, even where the debt is a judgment debt, and the Court will always inquire where the circumstances are suspicious. The onus is then on the creditor to show sufficient consideration. As JAMES, L.J., said in *Ex p. Banner* (*i*): "A judgment is always conclusive when there has been a real fight between the parties. The object of the bankruptcy rule was to prevent a man from confessing judgments in favour of his friends just before his bankruptcy."

In this case the debtor had been unable to go into the witness-box to deny the debt, because in other proceedings, and for the purpose of defrauding third parties, he had already sworn what was false, namely, that the person who obtained the

(*h*) *Re Coates* (1892), 9 Mor. 87.

(*i*) (1881), 17 Ch. D. 480.

fraudulent judgment was entitled to the debt, and BRETT, L.J., said (*k*): "In my view the judgment in the present case was a dishonest judgment, obtained by dishonest pressure, not because there was any doubt about the cause of action, not even because either party believed that there was any doubt about the cause of action, but, both parties knowing that there was no real cause of action, the one endeavoured to oppress the other by reason of that other's infamy known to him, and the other yielded, not because he believed there was, or doubted whether there was, a cause of action, but because he did not dare to face the consequences of his own infamy."

In *Ex p. Kibble* (*l*), a case which went to the Court of Appeal in Chancery, the debtor had contracted debts during infancy for jewellery and other things not necessities (*ll*). He gave a bill of exchange for them, attained majority, was sued, and judgment was obtained against him by default.

It was held by JAMES and MELLISH, L.JJ., that there was no debt on which a petition could be founded, notwithstanding the judgment, since the Infants Relief Act, 1874 prohibits ratification, after majority, even on fresh consideration, of debts contracted during infancy; and JAMES, L.J., said (*m*): "It is the settled rule . . . that the Court of Bankruptcy can inquire into the consideration for a judgment debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. If a judgment were conclusive a man might allow any number of judgments to be obtained by default against him by his friends or relations without any debt being due on them at all; it is therefore necessary that the consideration of the judgment should be liable to investigation." (*n*).

- (3) *Alimony*, i.e. *the payment ordered by the Court to be made by a husband to his wife during the subsistence of a marriage, either after an order for judicial separation or during the pendency of a matrimonial cause, is not a debt due from the*

(*k*) At p. 490.

(*l*) (1875), 10 Ch. 373.

(*ll*) Necessaries are those requirements appropriate to the station in life to which the infant belongs and of which he has not already a sufficient supply.

(*m*) At p. 376.

(*n*) Cf. *In re Cole*, [1931-32] B. & C.R. 7 (a case on s. 42) in which it was held that a settlement in pursuance of a compromise of an action for forfeiture under the Marriage Act, 1823, was not void and the compromise was in good faith and was the necessary valuable consideration for the settlement.

In other words, in order for alimony can only be enforced under must be a debt owing on the husband's Act, 1869, and the remedy ceases if the husband is insolvent. The wife's right to alimony is a liability by contract, and it is the date on which the Court finds her party to the other.

(4) Statute-barred debts remain debts, since the Statutes of Limitation merely provide that one method of recovering them, namely, any action at law, shall no longer be available to the debtor after the lapse of the prescribed period of

Thus, in *Re Porras* it is held that a creditor cannot run after the date of the receiving order to prove a debt in the sum of £40. if a debt was not barred at the date of the bankruptcy. Financial difficulties may be proved in the bankruptcy.

(w) ()

(a) *Ex parte Jones, In re Jones* (1881), 18 Ch. D. 109, C.A. *Vide ante*, p. 45.

SET-OFF the debt, and BRETT, L.

By s. 31 of the Bankruptcy Act it in the present case where there have been mutual credits, dishonest pressure, where mutual dealings" between a debtor and a creditor, but the cause of action, her "an account shall be taken of what that there was any debt, creditor, to the other in respect of such mutual parties knowing that the debtor endeavoured to oppress the creditor, due from the one party shall be set off against my known to him, and the due from the other party, and the balance, due there was, or does, no more, shall be claimed or paid on account, but because he did not.

The section provides, however, that a creditor shall not take the benefit of any set-off if he had, in his own infamy." He went to the Court of Bankruptcy. credit to the debtor, notice of any set-off of his debts during the bankruptcy. The state of the account between the creditor and the debtor, taken as at the date of the receiving order, necessities (11). He gave

Thus, in *In re Daintrey* (u), D., a solicitor, owed £86 to M., another solicitor. D. committed an act of bankruptcy, and subsequently M. (without knowledge of the act of bankruptcy) purchased D.'s practice. The purchase price was to be based on a share of the profits, and could not be ascertained for three years after the date of the purchase.

It was held by the Court of Appeal (LINDLEY, M.R., JEUNE, P. and ROMER, L.J.) that the dealings between M. and D. were "mutual dealings" within the corresponding section (uu) of the Bankruptcy Act, 1883, and that M. might therefore set off the £86 due to him from D. against the purchase price of the practice; and that the date of the receiving order obtained by D. after the act of bankruptcy, was the proper time to ascertain what those dealings were. They that the consideration of mutual—that is to say, they must be investigated." (n). If they must be between a debtor against whom a debt has been made, and a creditor claiming the debt, the Court to be made the receiving order—that is to say, having the existence of a marriage or a debt in the bankruptcy proceedings initiated or during the order (v). *a debt due from the*

At the commencement of the bankruptcy, need not be debts due on each side. It is sufficient that at the commencement of the bankruptcy there existed a debt on the one hand and a liability, which in due course would supply into a debt, on the other (v).

(u) [1900] 1 Q.B. 546.

(uu) Sect. 38.

(v) *Per* BIGHAM, J., in the Divisional Court. His judgment was by the Court of Appeal, at p. 568.

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The term "mutual credit" is a wider term than "mutual debt." As Lord BROUGHAM said, in *Young v. The Bank of Bengal* (w), ". . . the introduction of the words 'mutual credit' extends the right of set-off to cases where the party receiving the credit is not debtor *in presenti* to him who gives the credit."

In other words, in order to constitute mutual debts, there must be a debt owing on each side; but for the purpose of mutual credit it is sufficient that there is a debt owing by one party and a liability by which a debt will become owing in the future from the other party, or even such a liability due from each party to the other.

What may be the subject of Set-off in Bankruptcy.—Provided there is mutuality (*vide post*) any claim provable in bankruptcy may be set off. The right even extends to unliquidated damages if provable (x), *i.e.* unliquidated damages for breach of contract but not for tort. It includes damages for fraudulent misrepresentation by the bankrupt on the sale of a chattel (y); this is based on the view that such a fraudulent misrepresentation is not a personal tort, but a breach of the obligation arising out of the contract of sale (z).

It is immaterial that cross-claims are of a different nature, *e.g.* one on a deed and one on a simple contract (a).

What may not be Set Off—Amongst those claims which do not form the subject of set-off are the following:

(a) *Money given for a specific purpose which has not been carried out.*

Thus, in *Re Porritt* (b), P. was indebted to his solicitor M. in the sum of £40. He consulted M. with reference to his financial difficulties, and M. declined to act further for him unless he received security for future costs. P. thereupon gave M. £15 to secure any costs which might be incurred. M. prepared a deed of assignment which P. executed. Subsequently P. was adjudged bankrupt, the act of bankruptcy being the execution of the deed of assignment. M. claimed to set off the balance of the £15 (after payment of costs incurred

(w) (1836), 1 Moo. P.C. 150.

(x) *Peat v. Jones* (1881), 8 Q.B.D. 147.

(y) *Jack v. Kipping* (1882), 9 Q.B.D. 113.

(z) *Per CAVE, J.*, in *Jack v. Kipping* (1882), 9 Q.B.D. 113. See this case explained by VAUGHAN WILLIAMS, J., in *In re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567 (at p. 571) (*post*, p. 272).

(a) *Ex parte Law* (1846), De Gex, 378.

(b) [1893] 1 Q.B. 455.

up to the execution of the deed of assignment) against the £40 due from the bankrupt or to treat the two amounts as "mutual credits."

It was held by the Court of Appeal that he could not do so, and Lord Esher, M.R., said:

"There is this difficulty. If the money was given to the solicitor for a specific purpose, then, as between him and the bankrupt, there could not be a set-off; nor as between them could there be any mutual credit. And, as regards the trustee in the bankruptcy, there is this difficulty, that the original credit was between the bankrupt and the solicitor, and the new credit is between the trustee and the solicitor" (because the title of the trustee related back to the date of the execution of the deed of assignment). "In other words, the two credits are between different parties, and therefore they are not mutual."

(b) *The balance of money given for a specific purpose after the purpose has been satisfied, unless there is evidence of consent to its remaining in the hands of the payee (c).*

In the case of a winding-up of a limited company, where the provisions of s. 38 of the Bankruptcy Act, 1883, were applicable, various sums of money had been given by the company to their solicitors to enable the latter to pay certain creditors who were pressing, in the event of the solicitors being unable to make arrangements with these creditors. Certain arrangements were made, and the solicitors retained in their hands a balance of £93 19s. They claimed to set off against this sum an amount of £325, representing their agreed costs in connection with various services.

It was held that the solicitors would have been entitled to set off their costs against the sum in their hands if the money had remained in the hands of the solicitors with the consent or knowledge of the company after the composition and costs had been paid (c).

The onus was on the solicitors to show the company's consent to the money remaining in their hands. As the judge (d) said: "In my judgment there can be no set-off in this case, because the money was received under a contract of bailment which allotted the money and necessitated the application of it to a specific purpose, and that bailment was never determined,

(c) *In re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567.

(d) VAUGHAN WILLIAMS, J., at p. 572.

and neither the company nor its liquidator ever consented to the money being held for any purpose other than the one for which it was originally intended."

The authorities were fully reviewed by ASTBURY, J., in *In re H. E. Thorne & Son, Ltd. (e)*, in which case it was decided that where there had been transactions between two firms and one firm took security in the form of two bills of sale on the property of the other firm and then sold under the bills of sale, and the result of the sale was that they had in their hands a considerable surplus after payment of the secured debt, they could set off such surplus against moneys owing from them to the other firm on a general account.

(c) *Costs in bankruptcy against costs in another matter (f)*.

Mutuality.—The debts which it is sought to set off against each other must be due between the same parties and in the same right. Thus, a joint debt cannot be set off against a separate debt. In the case of *Tyso v. Pettitt (g)* the facts were as follows:

For twenty-one years the firm of W. B. H. and J. H. supplied goods to B. and B. supplied goods to W. B. H. and J. H. individually. At the end of each year the amount due from B. to the firm of W. B. H. and J. H. was deducted from the amount due from W. B. H. and J. H. individually to B. and the balance (which was always in favour of B.) was paid.

The County Court judge held on the facts that there was no express or implied agreement that there should be mutual dealings, and it was held by a Divisional Court of the Queen's Bench Division that the dealings with separate members of a firm were not dealings with the firm without some agreement to that effect.

So also a debt due from an executor in his personal capacity cannot be set off against a debt due to him in his capacity as executor (h).

There may be a set-off where the debts are due in the same right in equity although not so due at law.

Thus, in *Bailey v. Finch (i)* a banking firm stopped payment in July, 1870, and were adjudged bankrupt. The defendant was a customer and was then overdrawn to the extent of about £300; he also had an account with the banking firm which he had opened some time previously as "executor of the late

(e) [1914] 2 Ch. 438.

(f) *Ex parte Griffin* (1880), 14 Ch. D. 37; *In re Debtor*, [1907] 2 K.B. 896.

(g) (1879) 40 L.T. 132.

(h) *Bishop v. Church* (1748), 3 Atk. 691.

(i) (1871), L.R. 7 Q.B. 34.

Mrs. A." The defendant was sole residuary legatee and, although a legacy and an annuity remained to be paid and provided for respectively, yet if an account of the deceased's estate had been taken at the time of the bankruptcy, the defendant would have been entitled to about £1,900 beneficially.

The plaintiff, as trustee of the bankrupt firm, sued for the balance due from the defendant on his private accounts. The defendant claimed to set off the sum due from the bank to him on his executor's account.

Held, by COCKBURN, C.J., and BLACKBURN and MELLOR, JJ., that as the defendant was actually entitled to more than the amount of the debt due to him on the executor's account he could set off such sum against the amount due from him personally to the plaintiff.

Apparent Exceptions.

- (a) Where a debt is due to an agent on a contract, on behalf of a concealed principal, it may be set off against a debt due from the agent in his individual capacity, since he is personally liable on both contracts.

In *Lee v. Bullen* (k) the plaintiffs were assignees of a bankrupt underwriter and the defendants were *del credere* agents, being employed to effect insurances and guarantee the solvency of the underwriters. They entered into the contract of insurance in their own names and/or as agents. A loss occurred and the underwriter failed to pay. The defendants paid their principals the underwriter's share of the loss. The plaintiffs then sued for premiums, and the defendants claimed that there were mutual credits.

It was held by CAMPBELL, C.J., and WIGHTMAN and CROMPTON, JJ., that the defendants had a good defence. As Lord CAMPBELL, C.J., said:

"Both on principle, and according to decided cases, I am quite clear that the facts raised a good defence. There was mutual credit between the parties; the underwriter trusts the brokers for the premiums, and they on the policy trust him that he will fulfil his engagements. The policy being effected in the names of the defendants, and they guaranteeing the solvency of the underwriters, the defendants are not merely nominal contractors, but had a real interest in the contract."

- (b) By the application of an equitable set-off a buyer from a factor (l) who is selling under a *del credere* commission

(k) (1858), 27 L.J.Q.B. 161.

(l) Factors are those "who are entrusted with the possession as well as the disposition of property" (Smith's Mercantile Law—adopted by BRETT, J.A., in *Ex p. Dixon* (1876), 4 Ch. D., at p. 137).

goods as his own may, if he knows nothing of the factor's principal, set off any demand he may have on the factor against the principal's demand for the price of the goods.

WILLES, J., laid down the requirements in *Semenza v. Brinsley* (m) as follows:

"The plea should show that the contract was made by a
"person whom the plaintiff had entrusted with the possession
"of the goods, that that person sold them as his own goods in
"his own name as principal with the authority of the plaintiff,
"that the defendant dealt with him as and believed him to be
"the principal in the transaction, and that before the defendant
"was undeceived in that respect the set-off accrued."

It was pointed out in *Ex p. Dixon* (n) that as regards third parties, the powers of an agent are measured by the apparent scope of his authority, and cannot be limited by any private communication with him (o), and the mere fact that an agent is entrusted with goods as a factor proves authority given to him by the principal to sell in his own name, so far as anybody is concerned to whom some limitation of that authority is not disclosed (p).

If, however, the buyer does not know whether the seller is a principal or an agent, and the seller is not entrusted with the goods, so that he is in fact only a broker and not a factor, then the buyer is not entitled to set off a debt due to him from the seller against the price of the goods sold (q).

(c) Similarly, in certain circumstances, a debtor may be allowed to set off claims of his own against the claim of an assignee of the debt (r).

(m) (1865), 18 C.B.N.S. 467.

(n) (1876), 4 Ch. D. 133.

(o) *Per* JAMES, L.J., at p. 136.

(p) *Per* BRETT, J.A., at p. 138.

(q) *Cooke v. Eshelby* (1887), 12 A.C. 271.

(r) See *Mangles v. Dixon* (1852), 3 H.L. Cas. 702; *Watson v. Mid-Wales Railway* (1867), 36 L.J.C.P. 285).

CHAPTER II

ORDER OF PAYMENT OF DEBTS

We have already seen (a) that one of the objects of the bankruptcy legislation is to ensure the just distribution of the debtor's property amongst his creditors, and this principle is enunciated in s. 33 of the Bankruptcy Act, sub-s. (7) of which provides that, subject to the provisions of the Act, "all debts proved in the bankruptcy shall be paid *pari passu*." There are, however, certain notable exceptions to this rule, and these exceptions may be divided into two classes: (1) debts which are entitled to preferential payment; and (2) debts which are postponed.

1. DEBTS ENTITLED TO PREFERENTIAL PAYMENT

(a) **Debts given Priority.**—The following classes of debts are made payable in priority to all other debts. They rank equally between themselves and must be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they abate in equal proportions between themselves (b):

- (1) *All parochial or other local rates, and all sums due on account of the spindles levy payable to the Spindles Board under the Cotton Spinning Industry Act, 1936 (bb) due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months (c) next before that time (d).*

The term "rates" includes rent of a water meter, if payable in advance, and water rate up to the date of the receiving order, but the rate for water supplied afterwards not being due at that time is not entitled to priority (e).

Where there is a rate which is payable in advance, and during

(a) *Ante*, p. 12.

(b) B.A. s. 33 (2).

(bb) s. 5.

(c) Calendar months (Interpretation Act, 1889, s. 3).

(d) B.A. s. 33 (1) (a) as amended by the Cotton Spinning Industry Act, 1936, s. 19

(e) *In re Mannesmann Tube Co., Ltd.*, [1901] 2 Ch. 93, a case on the similar provision in Company Law).

the currency of such rate the occupier of premises becomes bankrupt and, after his bankruptcy, remains in occupation of the premises, the whole of the rate due at the date of the receiving order is payable out of the bankrupt's estate in priority to other debts, even though the trustee in bankruptcy has sold the lease under which the bankrupt occupied the premises: the bankrupt remaining in occupation as tenant under the purchaser (f). The proper course for the trustee in such a case is to apportion such rate on the sale of the lease.

- (2) "*All assessed taxes, land tax, property or income tax assessed on the bankrupt up to the 5th day of April next before the date of the receiving order, and not exceeding in the whole one year's assessment*" (g). *The national defence contribution imposed by the Finance Act, 1937* (h) *has the same priority as is required to be given to income tax* (i).

The Court will not inquire into the question whether an assessment to tax was properly made, because, although the Court can go behind a judgment to ascertain whether there is a provable debt, such an assessment is not analogous to a judgment (i).

- (3) "*All wages or salary of any clerk or servant in respect of services rendered to the bankrupt during four months* (k) *before the date of the receiving order, not exceeding £50*" (l).

This includes wages or salary "earned wholly or in part by way of commission" (m). A difficulty may arise with regard to the proper interpretation of the term "clerk or servant." The position is by no means clear, and a detailed discussion on this point is beyond the scope of this work, but it may be pointed out that the question must be decided in each case with reference to the nature and terms of the employment.

The clerk or servant may prove in the bankruptcy for any excess over £50.

- (4) "*All wages of any workman or labourer not exceeding £25, whether payable for time or for piecework, in respect of services rendered to the bankrupt during two months* (k) *before the date of the receiving order*" (o).

(f) *In re Thomas* (1887), 4 Mor. 295.

(g) B.A. s. 33 (1) (a). (h) s. 19.

(i) Finance Act, 1937, Sched. V, Part III, para. 5.

(j) *In re Calvert* (1889), 2 Q.B. 145.

(k) Calendar months (Interpretation Act, 1889, s. 3).

(l) B.A. s. 33 (1) (b).

(m) B.A., 1926, s. 2.

(o) B.A. s. 33 (1) (c).

In re Field (p) F. employed H. as general foreman and over-looker of his brickyard at a weekly wage. He then made an arrangement with H. that, instead of receiving a weekly wage, H. should undertake the manufacture of bricks by piecework, and that F. should pay H. so much per thousand for the bricks produced. H. continued to employ the same men and paid them, but they could be and were from time to time dismissed by F., who also had the right to engage fresh men. H. only received the amount paid for producing bricks. He could be dismissed at a week's notice.

Held, by CAVE, J., on a case stated, that H. was a workman or labourer within the section. As CAVE, J., said: "He has none of the privileges of a contractor. He cannot select workmen. He is engaged by the week; he may be discharged at a week's notice, and must give a week's notice. His condition is that of a workman and not that of a contractor. The mere fact that the amount passes through his hands does not make him less a workman."

In the case of *Ex p. Allsop* (q), the Chief Judge said (r):

"The master had to provide everything; and although the "servant had to get the assistance of others to help him in his "work, that does not prevent him from claiming his money as "wages."

It is expressly provided that in the case of a labourer in husbandry who "has entered into a contract for the payment of a portion of his wages in a lump sum at the end of the year of hiring, the priority under this section shall extend to the whole of such sum, or a part thereof, as the Court may decide to be due under the contract, proportionate to the time of service up to the date of the receiving order" (s).

It should be noticed that by virtue of Bankruptcy Rule 251 one proof on behalf of all workmen is sufficient. The workman or labourer may prove in the bankruptcy for any excess over £25.

- (5) *The amount due in respect of compensation under the Workmen's Compensation Act, 1925, the liability wherefor accrued before the date of the receiving order* (t).

This is subject, however, to the provisions of s. 7 (1) and (2) of the Workmen's Compensation Act, 1925, to the effect that if an employer has insured himself against his liability under this

(p) (1887), 4 Mor. 63.

(q) (1875), 32 L.T. 433.

(r) At p 434.

(s) B.A. s. 33 (1) (c).

(t) Workmen's Compensation Act, 1925, s. 7 (3).

Act, then, on the employer's bankruptcy, his rights against the insurers shall vest in the workman; but if the insurers' liability to the workman does not cover the whole of the employer's liability to the workman, the latter may prove for the balance in the bankruptcy. In this case, where the employer has insured against his liability, the right of priority given by the Bankruptcy Act no longer applies (v).

So in *In re Pethick, Dix & Co.* (x), a workman was entitled under agreement to £1 a week compensation. The employers had insured, and subsequently first the employers and then the insurance company went into liquidation. The same provisions apply in the case of the liquidation of a company as in the case of the bankruptcy of an individual.

It was held by NEVILLE, J., that by s. 5 (5) of the Workmen's Compensation Act, 1906 (y), the workman's claim to priority had gone, and that he could not prove in the bankruptcy or liquidation of his employers except under s. 5 (2) of the Act (z), i.e. where the insurance does not cover the whole of the employer's liability.

But in *In re Renishaw Iron Co., Ltd.* (a) the insurance company went into liquidation first and subsequently the employers went into liquidation.

It was held by NEVILLE, J., that s. 5 (1) of the Workmen's Compensation Act 1906 (b) transferred the rights of the employers to prove in the liquidation of the insurance company to the workman, although the insurance company was expected to pay a much smaller dividend than the employers.

It should be noticed that the rights of the employers against the insurers are entirely transferred to the workman, so that the employers or their trustee in bankruptcy no longer have any claim against the insurers (c).

If the compensation is a weekly payment, the amount due to the workman on the bankruptcy of the employer is to be taken to be the amount of the lump sum for which the weekly sum could, if redeemable, be redeemed on the application of the employer (d). But if the employer was insured it would seem that where the compensation is a weekly payment the

(v) Workmen's Compensation Act, 1925, s. 7 (5).

(x) [1915] 1 Ch. 26.

(y) Now incorporated in s. 7 (5) of the 1925 Act.

(z) Now incorporated in s. 7 (2) of the 1925 Act.

(a) [1917] 1 Ch. 199.

(b) Now incorporated in s. 7 (1) of the 1925 Act.

(c) *Craig and Another v. Royal Insurance Co., Ltd.* (1914), 84 L.J.K.B. 333.

(d) Workmen's Compensation Act, 1925, s. 7 (3).

right of the workman would be to continue to receive such weekly payments.

- (6) *The debt due by virtue of Section 3 (5) of the Workmen's Compensation (Coal Mines) Act, 1934, from an insured person to the insurer (dd).*

This refers to the case where an insurer becomes under any liability to pay compensation which he would not have been under but for the provisions of s. 3 (4) of this Act.

- (7) *All contributions payable under the Unemployment Insurance Act, 1935, in respect of employed persons and in respect of employed contributors under the National Health Insurance Act, 1936, during twelve (e) months before the date of the receiving order (ee).*

These contributions need not be formally proved in the bankruptcy.

(b) Preferential Claim in the Case of Apprenticeship.—Where money has been paid by or on behalf of an apprentice or artied clerk of the bankrupt as a fee, the trustee may, on application to him, pay such sum out of the bankrupt's property as, subject to an appeal to the Court, he thinks reasonable (f). The payment may be made to or for the use of the apprentice or artied clerk; and the trustee, in considering the application, must take into consideration the following matters:

- (1) The amount paid by the apprentice or artied clerk or on his behalf;
- (2) The term served with the bankrupt under indenture or articles before the commencement of the bankruptcy; and
- (3) All the other circumstances of the case.

In *In re Richardson* (g) the apprenticeship deed was dated February 26, 1886, and the services commenced on March 1. The sum of £60 was paid to the master on account of a fee of £100, the balance to be paid in later years. The apprenticeship was for five years. On April 8, 1886, a receiving order was made against the master, and on May 25 the apprentice was told not to return to work. The sum of £50 was ordered to be returned, but this case cannot be taken as a guide, since each case depends on its own particular circumstances.

(dd) Workmen's Compensation (Coal Mines) Act, 1934, s. 3 (6).

(e) Calendar months (Interpretation Act, 1889, s. 3).

(ee) B.A. s. 33 (1) (e) as amended by Unemployment Insurance Act, 1935, s. 20 (2) and National Health Insurance Act, 1936, s. 177 (2).

(f) B.A. s. 34 (1).

(g) (1887), 4 Mor. 47.

It should be noticed that the trustee has power, instead of repaying any part of the fee, to transfer the indenture of apprenticeship or articles of clerkship to some other person; and if the bankrupt, or the apprentice or articulated clerk gives notice in writing to the trustee, the adjudication of bankruptcy will be a complete discharge of the indenture or articles (*ff*).

(c) **Landlord's Power of Distress.**—"The landlord or other person to whom any rent is due from the bankrupt may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that, if such distress for rent be levied after the commencement of the bankruptcy, it shall be available only for six months' (*h*) rent accrued due prior to the date of the order of adjudication, and shall not be available for rent payable in respect of any period subsequent to the date when the distress was levied" (*j*).

The person claiming rent may, however, "prove under the bankruptcy for the surplus due for which the distress may not have been available" (*j*). If the distress be levied before the commencement of the bankruptcy it will be available for all arrears then recoverable. Even if the rent is expressly made payable in advance, the landlord cannot distrain in respect of rent for any period subsequent to the date of the distress.

It should be observed that by s. 33 (4) of the Bankruptcy Act it is provided that where there is a distress within three months (*h*) next before the date of the receiving order, the debts enumerated under (a) above to which priority is given are a first charge on the goods distrained or the proceeds of sale thereof: but if the person distraining pays money under such charge he will have the same rights of priority as the person to whom such payment is made.

The effect of this provision is that if the bankrupt's estate is insufficient to pay in full all the debts to which priority is given, then a person who distrains for rent within three calendar months before the date of the receiving order must contribute (to the extent, if necessary, of the value of the goods distrained or the proceeds of sale) towards making good the deficiency: but if the estate is more than sufficient to pay the priority debts and yet the person distraining has been called on to contribute

(*ff*) B.A. s. 34 (1).

(*h*) Calendar months (Interpretation Act, 1889, s. 3).

(*j*) B.A. s. 35 (1).

towards them in respect of his distress, such person distraining will have a claim on the estate after payment of preferred debts, to the extent of his contribution, in priority to all other debts.

It should be noticed that a landlord has a further right to be paid where goods have been seized on behalf of an execution creditor. By the Landlord and Tenant Act, 1709, s. 1 (relating to High Court executions), and the County Courts Act, 1934, s. 134 (relating to County Court executions), where any goods have been taken in execution (*i.e.* to satisfy a judgment debt), the execution creditor must, before removal of the goods, pay the landlord the rent due, provided that the arrears do not exceed one year's rent.

The Bankruptcy Act (*k*) limits the amounts of rent so to be paid to the landlord to six calendar (*l*) months' rent, unless the notice claiming rent was served on the officer who is levying the execution before the commencement of the debtor's bankruptcy; and unless the notice was so served the landlord cannot claim rent payable in respect of any period subsequent to the date of the notice. If before receiving notice of a receiving order the officer levying execution pays over to the landlord any rent in excess of that to which the landlord is entitled, the landlord is liable to pay to the trustee in bankruptcy any such rent so in excess, but he may prove in the bankruptcy for the amount of such excess (*m*).

2. DEBTS WHICH ARE POSTPONED

(a) **Loans between Husband and Wife.**—Sect. 36 of the Bankruptcy Act contains a provision that a husband who has lent or entrusted any money or other estate to his wife for the purposes of her trade or business, and a married woman who has lent or entrusted any money or other estate to her husband for the purpose of any trade or business carried on by him or otherwise shall not, on the bankruptcy of the spouse to whom the money or other estate was lent or entrusted, be entitled to claim any dividend as a creditor in respect thereof until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

The following points should be noticed:

(*k*) S. 35 (2)

(*m*) B.A. s. 35 (3).

(*l*) Interpretation Act, 1889, s. 3.

- (1) In the case of money or other estate lent or entrusted by a wife to her husband, such money or other estate will be treated as assets of his estate, but there is no corresponding provision in the case of loans or property entrusted by a husband to his wife.
- (2) In each case the section only applies to loans or property entrusted to the other spouse for the purposes of his or her trade or business, although the wording differs in each case. Where the husband is the recipient the words are "lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise," and it has been held that the words "or otherwise" refer to "carried on by him" and do not extend the section so as to include all loans or property entrusted (n).
- (3) The principle of *Ex p. Taylor, In re Grason* (o) applies; and therefore a wife who has lent money to her husband or entrusted property to him for the purpose of his trade or business is not only postponed in her claim, but cannot put in any proof at all until all the other creditors for valuable consideration have been paid in full; and any resolution passed by means of the vote of a married woman before the claims of the other creditors are satisfied will not be registered (p).

It should, however, be noticed that that part of the judgment of CAVE, J., in this case, which refers to the burden of proving the purpose for which the money was lent or the property entrusted, received consideration and was explained by the Court of Appeal in *In re Cronmire* (q), in which case it was held that as a matter of construction there was nothing in s. 3 of the Married Women's Property Act to show that the wife was bound to prove that the money was not advanced for the purpose of the husband's business (r).

- (4) If the loan was originally made by a wife to her husband for the purposes of his business, and subsequently the husband alters his liability by granting her an annuity in

(n) *Ex p. Tidswell* (1887), 4 Mor. 219, approved by the Court of Appeal (A. L. SMITH, RIGBY and VAUGHAN WILLIAMS, L.JJ.) in *In re Clark*, [1898] 2 Q.B. 330, both these cases being decided on the similar section (3) of the Married Women's Property Act, 1882.

(o) (1879), 12 Ch.D. 366. *Vide post*, p. 285.

(p) *In re Genese* (1885), 16 Q.B.D. 700, decided on a similar section in the Married Women's Property Act, 1882. (q) [1901] 1 K.B. 480.

(r) per RIGBY, L.J.

consideration of the discharge of the loan, the wife will be entitled to prove in competition with the other creditors.

Thus, in *In re Slade* (s) a wife lent her husband £1,000 in 1900 for the purposes of his farmer's business. In 1910 he executed a bond for £2,000, whereby it was recited that he had agreed to sell her an annuity of £40 per annum for £1,000. The original loan was cancelled, and thereafter the wife could only claim her annuity. Subsequently her husband died, and she assigned the bond to D. for valuable consideration. The husband's estate was administered in bankruptcy. D. claimed to prove in competition with the other creditors.

It was held by SARGENT, J., that D. could do so on the ground that when the bond was given "the debt was completely put an end to, and that it was impossible for the wife at any time after that transaction . . . to sue the husband for this sum of £1,000 or any part of it; she completely changed the nature of the pecuniary relationship between herself and her husband, and became from that time forward a person merely entitled to the receipt of an annuity during her life of £40 from her husband, or from his estate."

He continued:

"In these circumstances in my judgment s. 3 of the Act of "1882" (he meant s. 36 (2) of Bankruptcy Act) "has no application to this case. The wife, or rather her assignee, is suing "merely as an annuitant, claiming for the value of an annuity "which was granted for good and valuable consideration, and "the mere fact that the origin of the annuity was the sum of "£1,000 advanced by the wife to the husband is immaterial."

(b) Loans to Traders.—The Partnership Act, 1890, s. 2, provides (t) that

the advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such: Provided that the contract is in writing and signed by or on behalf of all the parties thereto;

and s. 3 provides that

in the event of a person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section . . . being adjudicated a bankrupt, . . . the lender . . . shall not be entitled to recover anything in

(s) [1921] 1 Ch. 160.

(t) S. 2 (3) (d).

respect of his loan . . . until the claims of the other creditors of the borrower . . . for valuable consideration in money or money's worth have been satisfied.

These sections re-enact in substance the celebrated Bovill's Act (v), the object of which was to relieve persons who lent money on such terms from the liability attaching to the relationship of partners.

It should be observed that the protection given by s. 2 only applies where the contract is in writing, but s. 3 does not require a written document and, consequently, a lender, if he is not in fact a partner, will still be postponed under s. 3, even though there is no written contract (x).

The principle to be applied is that when a person is a lender in circumstances which bring him within the provisions of s. 3 of the Partnership Act, 1890, he will not be allowed to prove at all until after all the other creditors for valuable consideration have been paid in full, and any resolution passed by means of the vote of such a person will not be registered unless the resolution could have been passed by the votes of the other creditors or unless the claims of the other creditors have been satisfied in full (y).

Three points deserve particular consideration:

- (1) *What is "a rate of interest varying with the profits" or "a share of the profits arising from carrying on the business"?*

In *In re Young* (z) VAUGHAN WILLIAMS, J., decided that the receipt of a fixed sum expressed to be payable "out of the profits" is a share of the profits within the meaning of s. 3 of the Partnership Act, 1890, and that the lender on such terms is thereby postponed, because if there are no profits the fixed sum is not payable.

On the other hand, the Court of Appeal (LINDLEY, M.R., and RIGBY and COLLINS, L.JJ., reversing WRIGHT, J.) held in *In re Gire* (a) that the mere fact that an annuity payable to a lender in consideration of a loan would probably be paid out of the profits and could not (in the particular circumstances of the parties) be otherwise paid, did not bring the transaction within the Act. As LINDLEY, M.R., said (b): "To my mind it is quite obvious that (the lender) was simply stipulating that a certain annuity should be paid to her, and that she is not a person

(v) 28 and 29 Vict. c. 86 (1865).

(x) *Re Fort*, [1897] 2 Q.B. 495.

(y) *Ex parte Taylor*, *In re Grason* (1879), 12 Ch.D. 366, C.A.

(z) [1896] 2 Q.B. 484.

(a) (1899), 6 Mans. 249.

(b) At p. 254.

receiving . . . a portion of the profits of the business within the meaning of the provisions of s. 3 of the Partnership Act, 1890. It is a fallacy to say that the person who has to pay her the annuity is a gentleman engaged in the business, and that, therefore, she is to receive from him a share of the profits. Doubtless it is quite true that, unless he carried on that business, or a similar one, he would be unable to pay (the lender) her annuity; but it does not follow from that that she is to be treated as bargaining to receive a share of the profits of the business any more than any of his other creditors, none of whom, presumably, would be paid unless he carried on some business and earned some income. 'That being so, you cannot bring this agreement within the terms of s. 3 fairly construed.'

It should be noticed that this was a case not only of a loan, but also of a sale of a business, and therefore it is an authority on the subject of the purchase price of the goodwill of a business (c).

In *In re Vince* (d) there was a loan to a trader for the purpose of his business, and in consideration thereof the trader agreed to pay interest thereon by two regular half-yearly payments of £462 10s. for every half year, and it was further provided that in case the trader should be unable to pay unto (the lender) any portion of the half-yearly payment . . . by reason of the deficiency of the profits of the trader, then and upon every such occasion a due allowance should be made by the lender to the trader in respect of the same in a fair and reasonable manner.

It was held by the Court of Appeal (Lord ESHER, M.R., BOWEN and A. L. SMITH, L.JJ.), reversing a Divisional Court, that the lender was entitled to prove with the other creditors on the ground that it was impossible to say what was the real meaning of the agreement.

(2) *To what extent will a fresh lending take the loan out of the statute?*

The test here seems to be that to take the loan out of the provisions of the statute there must be a completed repayment (and not merely a fictitious or colourable repayment) and an entirely new transaction giving rise to an entirely new obligation.

The question is important, because a lender who comes within the terms of the section may find that the borrower's

(c) *Vide*, p. 290.

(d) (1892), 9 Mor. 222.

financial position is becoming unsound and may wish, quite justifiably, to escape from the serious consequences which would result to the lender if the borrower became bankrupt. Whether the lender succeeds in escaping or not depends on the real nature of the new transaction. This is well illustrated by two cases.

In *In re Mason (e)*, by a deed dated October 2, 1893, B. lent £1,600 to M. and D. B. for the purposes of a business, and by the same deed M. & D. B. became partners in the business. B. was to receive one-third of the profits. By a supplemental deed of June 1, 1895 (to which B. was a party), M. & D. B. dissolved partnership and B. continued her loan (together with further sums already advanced) to M., who carried on the business. M. became alone liable to repay. By a further deed of August 1, 1895, it was provided that M. should repay the £1,600 on December 31, 1895, and should pay to B. in lieu of interest thereon half of the net profits and should pay interest on the further sums advanced at the rate of 5 per cent.

It was held by WRIGHT, J., that the Court must go back to the first deed of October 2, 1893, and that the true inference from all the circumstances of the case was that when B. "advanced the further sums . . . she from time to time advanced those sums on the same basis as that on which she advanced the £1,600. . . . She advanced it on a profit basis, and if she advanced it on a profit basis *prima facie* s. 3 of the Partnership Act, 1890, applies. No doubt the agreement between her and M. was altered by the contract of August, 1895. But the mere fact that that stipulates for a different mode of being paid does not appear to have any legal effect in the way of constituting a repayment of the old loan and the advancing of a new loan."

It was also argued that s. 3 of the Partnership Act, 1890, could not in terms apply, because the money was lent to M. and D.B., and M. and D.B. were not bankrupt. With regard to this WRIGHT, J., said (f): "It is a very ingenious argument, but I think it is too great a refinement for me to follow it. The money was lent to a firm, and the person who now represents that firm has become bankrupt. . . . I think that, without doing any violence to the language of the section, it may be said that where money has been lent to a firm, and the persons constituting that firm dissolve the partnership, and the loan is continued on the same terms to one of them, that that is within the section."

(e) [1899] 1 Q.B. 810.

(f) At p. 815.

The other case is

In re Hildesheim (g). D. H. lent H. H. £20,000 for the purpose of setting him up in business under an agreement which provided that the borrower should pay interest at the fixed rate of 5 per cent. per annum "and also by way of additional interest such an amount as may be equal to one-fourth part of the net profits from time to time made by the said H. H. in his business of a merchant." The agreement also restricted the borrower from entering into any other business. This agreement fell within Bovill's Act. Subsequently a fresh arrangement was entered into whereby D. H. agreed "to continue his existing loan to the said H. H.," and the said H. H. agreed to pay interest thereon at the rate of 10 per cent. per annum. An affidavit by D. H. was read, from which it appeared that negotiations had taken place and that as a result of them the new arrangement was entered into.

It was held by the Court of Appeal (Lord ESHER, M.R., BOWEN and KAY, L.JJ.)

First, that there was no new advance but a continuation of the existing loan;
and secondly, that D. H.'s proof must be rejected.

Lord ESHER, M.R., puts the matter very clearly in the following words (h):

" . . . That money was advanced upon such terms as brought 'the transaction within Bovill's Act. That is admitted.

"Now it has been held . . . that the question is what was 'the state of things when the money was advanced. And if 'there has been only one advance, it signifies not how many 'times the terms of the loan have been altered. . . . The cases 'have said as long as the advance continues it is within Bovill's 'Act. . . . The truth is that if a person now, after that statute 'and after those decisions which have construed that statute, 'finds himself within the meshes of Bovill's Act he must, if he 'wants to get out of it, be very careful of his conduct, and he 'must have the money repaid to him without any understanding 'or agreement or arrangement. He must be absolutely free and 'have the money paid to him and that transaction absolutely 'closed. Then, if he afterwards of his own will or upon request 'enters into an absolutely new transaction—the first one being 'closed—he may get out of Bovill's Act. Unless he does that 'I am perfectly confident—unless he gets out absolutely free— 'not only free from contract but free from understanding—he 'does not get out of Bovill's Act. And if you please to say 'that they would enter into such a transaction as this— I will go 'the whole length—that the person who has obtained the first

(g) (1893), 10 Mor. 238

(h) At pp. 244-246.

"advance brings the money by arrangement with the lender
 "and puts it on the table and pushes it across to him, but upon
 "the understanding between them that the moment he has done
 "so the other shall push it back upon new terms, I say that that
 "is not a new advance; that is the old advance, and it is what
 "Mr. Finlay (counsel for the creditor) has so accurately called
 "a mere scenic thing—a mere scene, a mere play. But the
 "present case does not come up to that. There was no
 "money. . . ."

And KAY, L.J., says (at p. 249):

" . . . I do not think that this was— even if it can be called a
 "new loan—a new advance, and, it seems to me, Bovill's Act
 "does require, as pointed out during the argument by Lord
 "Justice BOWEN, a new advance by way of loan, and not merely
 "new terms upon which the original advance is to be held in
 "continuation of that original advance."

- (3) *The section prevents a person who lends money in the circumstances contemplated from "recovering" the loan, but does not prevent him from "retaining" property which he holds as security for the loan.*

Thus in *Ex p. Shiel* (j) S. lent money to L. for the purpose of L.'s business, and took a mortgage of a leasehold house and of the goodwill of the business as security. L. became insolvent and the trustee, under an arrangement, purported to sell the leasehold premises and the goodwill, and applied to the Court to order that S. should concur with him in assigning the mortgaged property to the purchaser free and discharged from all claims by S. in respect of his mortgage.

It was held by the Court of Appeal (JESSEL, M.R., JAMES, L.J., and BAGGALLAY, J.A.) that, though S. could not prove in competition with the other creditors for value, as the transaction came within the provisions of s. 5 of Bovill's Act, yet as he was not seeking "to recover anything in the shape of money" he could not be compelled to give up his security. JESSEL, M.R., pointed out that the right of the mortgagee to keep the estate did not depend upon his right to recover the debt in the action, but the two rights were wholly independent the one of the other. His right was, not to recover the money, but to keep the estate till the money was paid, which is a totally different thing.

And JAMES, L.J., said: "I think the word 'recover' means recover, and does not mean 'retain'."

(c) Purchase Price of Goodwill of a Business.—There is a somewhat similar provision under s. 3 of the Partnership Act, 1890 (also, in substance, re-enacting s. 5 of Bovill's Act), whereby a person who receives, "by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business," will not be entitled to prove or recover anything until the claims of the other creditors for valuable consideration in money or money's worth have been satisfied. This provision applies whether or not the agreement is in writing (*k*).

(d) Claims to Dividend in respect of Contracts in consideration of Marriage to Settle After-acquired Property.—It is provided by s. 42 (2) of the Bankruptcy Act that any covenant or contract made by any person in consideration of his or her marriage for the future payment or settlement for the benefit of the settlor's wife or husband or children of any money or property shall, under certain conditions (*l*), be void against the settlor's trustee in bankruptcy unless the covenant or contract has been executed at the date of the commencement of the bankruptcy. In such a case the persons entitled may claim for dividend, but their claim will be postponed until all claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

Furthermore, by s. 42 (3) of the Bankruptcy Act (*m*), any payment of money (except premiums on a policy of life assurance) and any transfer of property made in pursuance of such a covenant or contract will be void against the trustee in bankruptcy, unless the persons to whom the payment or transfer was made prove one of the circumstances mentioned in this subsection. If the payment or transfer is declared void the persons to whom it was made may claim for dividend, but only after all claims of creditors for valuable consideration in money or money's worth have been satisfied.

(*k*) Cf *In re Gutter* (1899), 6 Mans. 249; *ante*, p. 285.

(*l*) *Ante*, p. 210

(*m*) *Ante*, pp. 217-219.

CHAPTER 12

DECLARATION OF DIVIDENDS

Early Payment Desirable.—It is obviously of benefit to the creditors that a trustee make early distribution of the moneys received by him from the realisation of a bankrupt's assets. It is therefore provided (*a*) that a trustee shall, with all convenient speed, distribute all money in hand by way of dividends amongst the creditors who have proved their debts: this, however, is subject to his right to retain such sums as may be necessary

- (1) for the costs of, and incidental to, administration;
- (2) for preferential claims;
- (3) for claims of creditors residing at such a distance from the place where the trustee is acting that they have not had sufficient time to tender proofs, or establish them if disputed;
- (4) for debts provable but the subject of claims not yet ascertained (*e.g.* a mortgagee who has petitioned the Court for an order of sale);
- (5) for disputed proofs or claims.

Times for Declaration.—The first dividend is to be declared within four months after the conclusion of the first meeting: subsequent dividends at intervals of not more than six months. The trustee may, however, postpone declaration to a later date on satisfying the committee of inspection that there is sufficient reason for doing so (s. 62). In summary cases (*b*), where the Official Receiver is trustee, the time for payment of the first dividend is extended to six months; moreover, in these cases, wherever practicable the estate is to be realised and distributed in a single dividend (r 298).

Notice of Intention to Declare.—Before declaring a dividend the trustee must give to the Board of Trade notice of

(a) B.A. ss. 62 and 64.

(b) See *post*, p. 317.

his intention to do so, in order that the same may forthwith be inserted in the *London Gazette*; at the same time he must send notice to such of the creditors mentioned in the bankrupt's statement of affairs as have not proved their debts. Such notice must specify the latest date up to which proofs must be lodged, which date must be not less than fourteen days from the date of such notice. The dividend must be declared within two months from the date of such notice, otherwise the trustee must cause a fresh notice to be gazetted, but in such case he need not notify the creditors again.

Appeal against Rejection of Proof after Notice of Intention to Declare.—Ordinarily a creditor has twenty-one days within which to lodge an appeal against the rejection of his proof, but where such an appeal is lodged after the latest date for proofs to be lodged the appeal must, subject to the power of the Court to extend the time in special cases, be commenced and notice thereof given to the trustee within seven days from the notice of rejection.

Notice of Declaration.—Upon declaring a dividend the trustee must give notice to the Board of Trade in order that such notice may be gazetted; he must also send to each creditor whose proof has been admitted a notice showing the amount of the dividend and when and how it is payable, together with a statement showing the position of the estate.

Payment of Final Dividend.—When the trustee has realised all the property of the bankrupt, or so much thereof as can, in the joint opinion of himself and the committee of inspection, be realised without needlessly protracting the trusteeship, he must declare a final dividend; thereupon the process previously outlined must be carried through by the trustee. Should any creditor fail to establish his claim to the satisfaction of the Court within the time limited for that purpose, the trustee can proceed to pay the dividend without regard to any such claim.

No Action for Payment of Dividend Lies.—No action for a dividend shall lie against a trustee, but if he refuses to pay any dividend the Court may, if it thinks fit, upon application, order him to pay it, and also to pay, out of his own money, interest thereon from the time that it is withheld, and the costs of the application (s. 68).

Creditors not Entitled to Disturb Distribution of Dividend Declared.—Any creditor who has not proved his debt before the declaration of any dividend shall be entitled to prove, and to be paid out of any money for the time being in the hands of the trustee any dividend or dividends the creditor may have failed to receive before that money is applied to the payment of any future dividend; the creditor is not, however, entitled to disturb the distribution of any dividend declared before his debt was proved (s. 65).

Proof Reduced or Expunged after Payment of Dividend.—Where a trustee admits a proof and pays dividend on the amount admitted, on the proof being subsequently reduced by the Court, the trustee may deduct from any further dividend the amount overpaid to the creditor on the previous dividend (c).

Where, however, a proof which has been wrongly admitted is afterwards expunged, the creditor is entitled to retain any dividend already received (d).

Joint and Separate Dividends.—In partnership cases where joint and separate dividends are paid, such dividends must, unless the Board of Trade, on the application of any person interested, otherwise direct, be declared together, and the expenses of and incident to such dividends fairly apportioned by the trustee between the joint and separate estates (s. 63).

In *Ex p. Dickin* (e), where a creditor, was entitled to appropriate securities, which he held, either to his joint or separate debts as might be most to his advantage, the Court, upon his application, ordered that the dividend upon the joint estate should be declared before the dividend upon the separate estate.

Where one partner of a firm is adjudged bankrupt a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, cannot receive any dividend from the bankrupt's separate estate until the separate creditors have received the full amount of their debt (s. 63).

Production of Bills of Exchange, etc.—Where a claim is made in respect of a bill of exchange, promissory note, or

(c) *Re Scarle, Hoare & Co.* (1924), 59 L.J. 388.

(d) *Ex p. Harper, Re Tait* (1882), 21 Ch.D. 537.

(e) (1875), L.R. 20 Eq. 767.

other negotiable instrument or security, on which the bankrupt is liable, such bill of exchange, note, instrument, or security must be produced before payment of the dividend thereon, and the amount of the dividend must be indorsed upon the instrument. The Court, however, has power on special grounds to order production to be dispensed with (r. 269).

Dividend cannot be Attached.—A dividend cannot be attached by a judgment creditor (*f*), nor can a charging order on a dividend be made under s. 28 of the Solicitors Act, 1860.

Payment to Nominee.—A creditor may, by lodging a request and authority with the trustee, authorise the payment of dividends to some other person.

Can be sent by Post.—Dividends may at the request and risk of the creditor be transmitted to him by post.

Position of Assignee of Proved Debt.—An assignee of a debt due to a creditor who has proved cannot obtain an order for payment of the dividends to him, but he may apply to the Court to give leave to the trustee to place on the file a proof in substitution of the one filed by the assignor (*g*). An alternative to such application would be for the assignor to lodge an authority for payment of the dividends to the assignee.

A trustee is entitled to retain a dividend due to an assignee of a creditor to satisfy taxed costs which the creditor has been ordered to pay to the trustee (*h*).

Unclaimed Dividends.—Dividends remaining unclaimed for a period of more than six months must be paid by the trustee into the Bankruptcy Estates Account at the Bank of England (*i*). Any person entitled to any such dividend may, at any time, apply to the Board of Trade for payment, and the Board of Trade will, upon payment of the prescribed fee, so order if satisfied that the person applying is entitled (*k*). Dividend payable orders lapse after a period of three months from the date of issue; a reissue can be obtained upon application being made to the Board of Trade.

The Crown is entitled to the benefit of a proof lodged by a corporation which is subsequently dissolved (*l*).

(*f*) *Prout v. Gregory* (1889), 24 Q.B.D. 281.

(*g*) *Re Frost*, [1899] 2 Q.B. 50.

(*h*) *Re Mayne*, [1907] 2 K.B. 899.

(*i*) *Ante*, p. 130.

(*k*) B.A. s. 153.

(*l*) *Re Hugginson and Dean* (1899), 1 Q.B. 325.

Surplus remaining after Payment.—A bankrupt is entitled to any surplus remaining after payment in full of his creditors, with interest as provided by the Act, and the costs, charges, and expenses of the proceedings under the bankruptcy petition (*m*). The bankrupt's right to the surplus can be disposed of by will or deed or otherwise during the pendency of the bankruptcy, even before the surplus is ascertained, but such disposition would be ineffectual unless and until there proved to be a surplus (*n*). Moreover, such right of disposition would be subject to the provisions of s. 39, as amended by the Bankruptcy Act, 1926, s. 3, relating to a second or subsequent receiving order (*o*).

(*m*, B.A. s. 69.

(*n*) *Bird v. Philpott*, [1900] 1 Ch. 822.

(*o*) See *ante*, p. 229.

CHAPTER 13

DISCHARGE OF BANKRUPT

ONE of the objects of the bankruptcy law is to relieve the debtor of further responsibility after all his property has been applied for the purpose of paying his debts. It is, therefore, enacted that at *any time* after adjudication a debtor may apply to the Court to appoint a day for hearing his application for a discharge (*a*). The Court may not, however, hear the application until the public examination is closed (*b*). 'The registrar must give twenty-eight days' notice of the hearing to the Official Receiver and to the trustee (*c*). Fourteen days' notice to all the creditors disclosed in the bankrupt's statement, whether or not they have lodged a proof (*d*), must be given by the Official Receiver, who will also insert a notice in the *London Gazette* (*e*).

DISCRETION OF THE COURT TO GRANT A DISCHARGE

At the hearing of the application for discharge the Official Receiver will present a report to the Court, which must be filed at least seven days before the hearing (*f*). If the debtor wishes to challenge any statements contained in the report he must give notice in writing to the Official Receiver, specifying the statements objected to, within two days of the hearing (*g*), but otherwise the report will be *prima facie* evidence of its contents (*h*). 'This report will contain a statement not merely financial, but also concerning the debtor's conduct in the bankruptcy (*i*).

The application for discharge may be opposed by the Official Receiver, trustee, or any creditor (*k*).

At the hearing the Court has a discretion either

(1) to grant or refuse an absolute order for discharge; or

(a) B.A. s. 26 (1).

(c) B.R. 227 (1).

(e) B.R. 227.

(g) B.R. 231.

(i) B.A. s. 26 (2).

(b) B.A. s. 26 (1).

(d) *Re Spratley*, [1909] 1 K.B. 559.

(f) B.R. 230

(h) B.A. s. 26 (6).

(k) B.A. s. 26 (7).

- (2) to suspend the operation of the order for a specified time; or
- (3) to grant an order subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or with respect to his after-acquired property (*l*).

This discretion is, in certain cases, specified in sub-s. (3) of s. 26 of the Act, limited in accordance with certain conditions to be considered hereafter, but apart from these cases the discretion is general, though it must be judicially exercised.

Facts to be considered in the Exercise of Discretion.

The facts which should be considered by the Court are not only the Official Receiver's report, but any conduct of the debtor which is not outside the bankruptcy, that is to say, conduct or affairs of the debtor which can or may have had some effect upon the bankruptcy itself (*m*).

In *Re Barker* (*m*) the Court of Appeal had in front of them two cases in which an unpaid judgment for breach of promise was the primary cause of the debtor filing his own petition; in one case an absolute order for discharge was made, while in the other case a condition was attached that the bankrupt should consent to a judgment for the amount of the damages for breach of promise; both decisions were upheld. Lord Esher, M.R. (at p. 293), stated his view of the law as follows:

"Does it follow that the judge may take into consideration
 "upon the application for a discharge everything which has
 "been done by the bankrupt during his past life? It seems
 "to me that there must be some limit; and I think the judge
 "ought not to take into his consideration conduct which could
 "not have had anything to do with the bankruptcy, either in
 "producing it or affecting it in any way after its commencement.
 "For instance, a judgment for breach of promise of marriage
 "which had occurred years before, and after which the debtor
 "had begun to trade, a judgment for breach of promise when
 "the non-payment of the damages could have had nothing
 "whatever to do with producing the bankruptcy, ought not to
 "be taken into consideration. Only such conduct or affairs as
 "may or can have had some effect upon the bankruptcy itself
 "ought to be taken into consideration."

Provided, however, that the Court does consider the proper

facts, its exercise of discretion will not be readily interfered with by the Court of Appeal (*n*). If, however, the appellate Court does consider the order contrary to principle, it will not only quash the decision, but impose its own penalty: as, for example, in *Re Swabey* (*o*), where suspension for two years was substituted for a period of five years (*p*).

Naturally, discharge will only be refused altogether where there has been very gross misconduct, independently of the specific cases now to be dealt with (*q*).

Specific Cases Provided for in the Act.—The following cases have been the subject of specific provision:

- (1) The bankrupt has committed and been convicted of
 - (a) any misdemeanour connected with his bankruptcy;
 - (b) any felony connected with his bankruptcy (*r*).

The expression "connected with bankruptcy" appears to mean in the first place, "if there was a conviction upon facts which resulted in or brought the debtor's insolvency"; and in the second place, "if the facts upon which the conviction was based consisted in misconduct by the debtor either as a bankrupt, or in view of impending bankruptcy" (*s*). That is to say, offences *ejusdem generis* with those mentioned in the Debtor's Act, 1869, or the Bankruptcy Act.

- (2) The bankrupt's assets are not of a value equal to ten shillings in the pound on the amount of his unsecured liabilities, unless he satisfies the Court that this fact has arisen from circumstances for which he cannot justly be held responsible;
- (3) The bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him and as sufficiently disclose his business transactions and financial position within three years immediately preceding his bankruptcy; the books must be such and so kept that they would at once show the state of the business without any long and skilled investigation (*t*).

(*n*) *Re Shaw*, [1917] 2 K.B. 734.

(*o*) (1897), 76 L.T. 534.

(*p*) See also *Re Walmsley* (1907), 98 L.T. 55.

(*q*) *Re Badcock* (1886), 3 Mor. 138.

(*r*) B.A. s. 26 (2).

(*s*) *Re Hedley*, [1895] 1 Q.B. at p. 925.

(*t*) *Ex p. Reed* (1886), 17 Q.B.D. 244.

- (4) The bankrupt has continued to trade after knowing himself to be insolvent;
- (5) The bankrupt has contracted any debt provable in his bankruptcy at a time when he knew that he had no reasonable or probable ground of expectation of being able to pay it. The onus of proof of reasonable or probable ground is on him;
- (6) The bankrupt cannot satisfactorily account for the loss or deficiency of his assets which should be available for his creditors;
- (7) The bankruptcy was brought on, or contributed to, by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of business affairs;
- (8) The bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him;
- (9) The bankrupt has brought on, or contributed to, his bankruptcy by incurring unjustifiable expense in bringing any frivolous or vexatious action (v);
- (10) The bankrupt has, within three months preceding the receiving order, incurred liabilities with a view of making his assets equal to ten shillings in the pound on the amount of his unsecured liabilities;
- (11) The bankrupt has, on any previous occasion, been adjudged bankrupt or made a composition or arrangement with his creditors;
- (12) The bankrupt has been guilty of any fraud or fraudulent breach of trust (x).

In any of these cases the Court must (y) either

- (a) "refuse the discharge; or
 - (b) "suspend the discharge for such period as the Court thinks proper (z); or
 - (c) "suspend the discharge until a dividend of not less than ten shillings in the pound has been paid to the creditors;
- or

(v) *See* B. (Amendment) A., 1926, s. 1 (2).

(x) B.A. s. 26 (3).

(y) *See* B. (Amendment) A., 1926, s. 1 (1) (a).

(z) *See* B. (Amendment) A., 1926, s. 1 (1) (b).

- (d) "require the bankrupt as a condition of his discharge to consent to judgment being entered against him by the Official Receiver or trustee for any balance or part of any balance of the debts provable under the bankruptcy which is not satisfied at the date of the discharge, such balance or part of any balance of the debts to be paid out of the future earnings or after-acquired property of the bankrupt in such manner and subject to such conditions as the Court may direct; but execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available towards payment of his debts" (a).

Conditional Discharge.—It will be seen that in such cases there cannot be an absolute discharge, but the order if granted must be subject to some qualification. This qualification may be one of three kinds; either

- (a) suspension for a period of time; or
- (b) suspension until a dividend has been paid; or
- (c) consent to a judgment being entered.

In *Re Walmsley* (b) it was held that the Court had no jurisdiction to suspend both for a period of time and until a dividend had been paid, since these two penalties are cumulative. In this case the Court directed suspension till eleven shillings in the pound had been paid, but in *Re Kutner* (c) this was held to be outside the jurisdiction of the Court, which was limited to the amount of ten shillings.

Suspension with Condition.—It was also held in *Ex p. Huggins* (d) that there was no power to suspend the discharge and at the same time to impose a condition that a judgment should be entered, because on the grammatical construction of the Act these were alternative and not cumulative powers; but this has been expressly overruled by the addition of subs. 8 of s. 26, which enacts that there may be concurrently suspension with an attached condition.

Condition of Signing Judgment.—Where the discharge is conditional upon signing judgment against him, the debtor

(a) B.A. s. 26 (2)
(c) [1921] 3 K.B. 93.

(b) (1907), 98 L.T. 55.
(d) (1889), 22 Q.B.D. 277.

must consent to this course. If he fails to do so within one month the Official Receiver or trustee will apply to the Court under Bankruptcy Rule 233 (3) to revoke the order so made. In these circumstances the Court will make such other order as it thinks fit, as, for example, to suspend the discharge for a certain period of time (e). In *Re Gaskell* an army officer was made bankrupt in respect of damages for breach of promise, and refused to consent to a judgment, the Court at his instance directed suspension for two years, but indicated that it was entirely within the discretion of the Court as to what course should be adopted.

The judgment may be directed in respect of the whole or any part of the balance of debts unpaid in the bankruptcy (f), and the amount and part of the balance is within its discretion.

The judgment may be directed in the form that it is payable by instalments, and failure to fulfil the obligation will enable the Court to rescind the order. This power is in exercise of its general power to vary and rescind orders under s. 105 of the Act (g).

On the other hand, there is express provision in a proviso to s. 26 (2) that if the debtor can satisfy the Court that there is no reasonable probability of being able to comply with the terms of the order the Court may modify it. The question, which is then material, is not the whole conduct of the bankrupt, but whether there is a reasonable probability that he can perform the condition of his discharge (h).

Marriage Settlements.—It has been thought necessary to make special provision in the case of antenuptial settlements:

- (a) In respect of property already vested in the debtor, but where, at the time of making the settlement, he was not able to pay his debts independently of the property settled; and
- (b) In respect of after-acquired property (not being acquired in respect of his wife).

In either of these cases, if the Court is satisfied that either of these settlements was made

- (a) In order to defeat or delay creditors; or

(e) *Re Gaskell*, [1904] 2 K.B. 478. (f) *Ex p. Evans* (1893), 10 Mor. 136.

(g) *Re Summers*, [1907] 2 K.B. 166.

(h) *Re Roberts & Co.*, [1904] 2 K.B. 299.

(b) Was unjustifiable, having regard to the debtor's affairs at the time it was made,

the Court may refuse or suspend a discharge or impose a condition in like manner as in the case where the debtor has been guilty of fraud.

It will be noticed that this provision does not make this action compulsory upon the Court as in the case of fraud, nor does it affect the validity of the settlement.

Duty of the Bankrupt.—Notwithstanding his discharge, it remains the duty of the debtor to give any assistance that the trustee may require in the realisation or distribution of his assets. If he fails in his duty he is guilty of a contempt of Court, and, moreover, the Court has power to revoke his discharge without prejudice to any disposition or payment made prior to revocation but after his discharge (*k*).

This duty, apparently, includes giving further evidence of a contingency which falls into possession after discharge (*l*).

Certificate of Misfortune.—Finally, it should be added in this connection, that in order to avoid certain disabilities connected with bankruptcy (*m*) the Court has power to grant a "certificate of misfortune" together with the discharge, which may remove the disqualification. It has been held that it is within the discretion of the Court to grant such a certificate, although the discharge is suspended (*n*), and in the same case the question of what amounts to misfortune was also discussed.

In *Re Boulton* (*n*) the partners had contracted a debt provable in the bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation of being able to pay it. It was therefore necessary that their discharge should be suspended in accordance with the Act.

The Court of Appeal held, however, that a certificate of misfortune could be granted to the partner. HANWORTH, M.R. (at p. 89), stated his view of the principle as follows:

"There is a contrast made between misconduct and misfortune. In *re Lord Colin Campbell* (*o*) is the only case in which that section (now s. 26) has been seriously considered by the Court, and Lord ESHER, M.R., said: 'It is impossible to give an exhaustive meaning to be attached to "misfortune."'

(*k*) B A s. 26 (9)

(*l*) *Re F. A. Coulson*, [1934] 1 Ch. 45.

(*m*) As, for example, that imposed on Members of Parliament, see Bankruptcy Act, 1883, s. 32 (unrepealed) (for disabilities, see p. 104, *ante*.)

(*n*) *Re Boulton & Co*, [1927] 1 Ch. 79

(*o*) (1888), 20 Q.B.D. 816.

" 'I think, however, we must hold that, when the bankruptcy 'is not solely the result of some accident over which, or over " 'the directing causes of which, the debtor has no control, it " 'cannot be said to arise from "misfortune." ' It appears to "me that what Lord ESHER meant is that we ought, in considering 'misfortune,' to reject active conduct on the part of "the debtor from being included in the word. But I think also "that we must consider 'misfortune' in relation to the purposes "for which it is used - namely, the removal of a statutory "disqualification. It must be put in its true perspective. "FRY, L.J., said: 'It appears to me that what the Legislature " 'had in view in this proviso was the possibility of there being " 'cases in which a man might become a bankrupt without " 'thereby raising a presumption of his unfitness for holding " 'a public position.' "

His lordship then went on to say that a definition of "misfortune" was impossible, and that their decision could not form a precedent upon the particular facts, since each application must depend upon its own.

EFFECT OF DISCHARGE IN BANKRUPTCY

An order of discharge in bankruptcy is conclusive evidence of the bankruptcy and of the validity of all proceedings therein, so that the bankrupt can always plead the discharge in bar of any proceedings taken in respect of a liability occurring prior to the discharge (*p*). The discharge is, however, personal to the debtor, and does not release any other person who was at the date of the receiving order a partner or co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him, or who was surety, or in the nature of surety, for him (*q*).

Where a discharged bankrupt goes bankrupt a second time, it would appear that a contingency which has not been valued in the first bankruptcy but falls into possession after the discharge, may pass to the trustee in the second bankruptcy under the Bankruptcy Act, 1926 (*r*).

Exceptions to Release from Liability.—The general principle affecting the discharge is that it will release the bankrupt from all debts, which are provable in his bankruptcy, but it is expressly provided that there shall be the following exceptions to this rule:

(*p*) B.A. s. 28 (3).

(*q*) B.A. s. 28 (4).

(*r*) *Re F. A. Coulson*, [1934] 1 Ch. 45.

- (a) Any debt on a recognisance or any debt with which the bankrupt may be chargeable at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff or other public officer in a bail bond entered into for the appearance of any person prosecuted for any such offence; *unless the Treasury certify in writing their consent to his release;*
- (b) Any debt or liability incurred by means of any fraud or fraudulent breach of trust to which the bankrupt was a party, or from any debt or liability in respect of which he obtained forbearance by any fraud to which he was a party;
- (c) Any liability under a judgment against him in an action for seduction, or under an affiliation order, or under a judgment against him as co-respondent in a matrimonial cause, except to such an extent and under such conditions as the Court expressly orders in respect of such liability.

Release for Provable Debts.—Apart from these cases the discharge will release the debtor from all *provable* debts, but not, of course, from debts not provable in the bankruptcy (s), as, for example, unliquidated damages for defamation. The release does not, however, operate entirely to extinguish the debt for all purposes, since it may still be regarded as having some effect in a transaction where its continued existence is presupposed.

This was brought out in *Re Ainsworth* (t), where a testator left property to his children, directing that a debt due from his son should be brought into hotchpot. The son had in fact been made bankrupt and discharged between the date of the will and the testator's death, and the debt had been provable in the bankruptcy. It was, however, held that the debt or unpaid balance had to be brought into hotchpot in accordance with the testator's intention.

Debts Revived after Discharge.—At the same time, a mere intention to revive a debt after discharge without more will not be effective to render it enforceable, even though there is a written acknowledgment. The promise to pay is a mere *nudum pactum* (u).

(s) See p. 266, *ante*

(t) [1922] 1 Ch. 22.

(u) *Heather v. Webb* (1876), 2 C.P.D. 1.

On the other hand, a new agreement after discharge will be sufficient if it is given for valuable consideration, or, apparently, where it would be a binding contract irrespective of the pre-existence of the debt, although no valuable consideration is given (v). In *Re Bonacina* a debtor was under an obligation to an Italian firm. After his discharge he signed a document in the Italian form known as *privata scrittura*, acknowledging the debt and promising to pay. There was no valuable consideration, but in Italy this was immaterial, as it constituted a moral obligation to pay.

It was held that the obligation was not barred by the discharge in bankruptcy. COZENS-HARDY, M.R. (at p. 399), said:

"It is important to observe that the order of discharge only released the bankrupt from debts provable in bankruptcy "It has been held by a Divisional Court in *Jakeman v. Cook* (x), and by VAUGHAN WILLIAMS, J., in *Re Aylmer* (y), "that a promise after discharge to pay a debt barred by the "discharge is perfectly good if supported by a new and valuable "consideration. If, therefore, in 1906 an English contract for "value had been executed, I think the proof must plainly have "been admitted. But the '*privata scrittura*' is a document "subject to Italian law, and the evidence adduced by Italian "lawyers seems to me to have established that, according to the "law of Italy, the English doctrine of consideration being "necessary to support a contract has no application, and "further that the moral obligation to pay the debt is sufficient "to found a legal obligation if a document such as the '*privata* " '*scrittura*' has been executed. It seems to me, therefore, "that the claimant is in precisely the same position in this "country as he would have been if there had been an English "contract of the same date with a new and valuable considera- "tion. . . . Nor do I think that *Heather & Son v. Webb* (*supra*) "has any application. In that there was a contract without any "consideration to pay a debt barred by the bankruptcy. In the "present case there is a valid enforceable new contract subse- "quent to the discharge."

Further, it has been held in a more recent case (z) that if a bankrupt before discharge makes an agreement to pay in full a debt provable in his bankruptcy, this agreement will be enforceable if the agreement is made in consideration of a further loan. Such an agreement is not void as against public policy or because it is contrary to the policy of the Bankruptcy Acts.

(v) *Re Bonacina*, [1912] 2 Ch. 394. (x) (1878), 3 H. & N. 581.

(y) (1894), 1 Mans. 391.

(z) *Wild v. Tucker*, [1914] 3 K.B. 36.

CHAPTER 14

ENFORCEMENT OF BANKRUPTCY LAW AND BANKRUPTCY OFFENCES

Enforcement.—It will be noted in this chapter that the various remedies overlap and that a single act may make the debtor liable to more than one penalty. Sect. 22 of the Bankruptcy Act, we have seen (*a*), imposes duties on the debtor to attend meetings and aid in the discovery and distribution of his property.

Contempt of Court.—If he wilfully fails to perform the duties imposed by this section or to deliver up any part of his property which is divisible amongst his creditors and which is for the time being in his possession or control, to the Official Receiver or the trustee or to any person authorised by the Court to take possession of it, he is guilty of contempt of court, and in addition to any other punishment to which he may be subject, is liable to be punished accordingly (*b*). In like manner, in addition to any other punishment, any person who knowingly falsifies or fraudulently alters any document in or incidental to any bankruptcy proceeding is guilty of contempt of court (*c*). Besides this power of committal for contempt that the bankruptcy courts possess in common with other courts, it will be seen later in this chapter that failure to carry out these duties in certain respects amounts to a crime.

In addition the court may, by warrant, cause a debtor to be arrested, and any books, papers, money and goods in his possession to be seized, and him and them to be kept safely until such time as the court may order in the following circumstances:

Absconding Debtor.—If after a bankruptcy notice has been issued or after the presentation of a bankruptcy petition by or against him, it appears to the court that there is probable reason for believing that he has absconded, or is about to abscond, with a view to avoiding payment of the debt in respect

(*a*) See *ante*, p. 93.

(*b*) B.A. s. 22 (4).

(*c*) B.R. 382.

of which the bankruptcy notice was issued, or of avoiding service of a bankruptcy petition, or of avoiding appearance to any such petition, or of avoiding examination in respect of his affairs, or of otherwise avoiding delaying or embarrassing proceedings in bankruptcy against him; provided that no arrest upon a bankruptcy notice shall be valid and protected unless the debtor before or at the time of his arrest is served with such bankruptcy notice (*d*):

Removing Goods or Documents.—If after presentation of a bankruptcy petition by or against him it appears to the court that there is probable cause for believing that he is about to remove his goods with a view to preventing or delaying possession being taken of them by the Official Receiver or trustee, or that there is probable ground for believing that he has concealed or is about to conceal or destroy any of his goods, or any books, documents or writings which might be of use to his creditors in the course of his bankruptcy (*e*):

If after service of a bankruptcy petition on him or after a receiving order is made against him, he removes any goods in his possession above the value of five pounds without leave of the Official Receiver or trustee (*f*).

No payment or composition made or security given after arrest in these circumstances is exempt from the provisions relating to fraudulent preferences (*g*).

Default on Order to Pay Salary or Income.—If a debtor makes default under an order requiring him to pay a portion of his salary or other income (*h*) he is liable to be imprisoned for a term not exceeding one year (*i*).

Seizure of the Debtor's Property.—After a receiving order has been made, irrespective of whether adjudication has taken place or not, the court may issue a warrant authorising the seizure of any of the debtor's property, and with a view to such seizure any house, building or room of the debtor, where the debtor is supposed to be, or any building or receptacle of the debtor, where any of his property is supposed to be, may be broken open (*k*).

Search Warrant.—Where the court is satisfied that there is

(*d*) B.A. s. 23 (1) (*a*).

(*e*) B.A. s. 23 (1) (*b*).

(*f*) B.A. s. 23 (1) (*c*).

(*g*) B.A. s. 23 (2) and for fraudulent preference see *ante*, p. 57.

(*h*) See *ante*, p. 234.

(*i*) Debtors Act, 1869, s. 4 (5).

(*k*) B.A. s. 49.

reason to believe that property of a debtor against whom a receiving order has been made is concealed in a house or place not belonging to him, the court may grant a search warrant to any constable or officer of the court, who may execute it according to its tenor (*l*). According to the tenor of the form of warrant appended to the Bankruptcy Rules, any property found may be seized (*m*).

BANKRUPTCY OFFENCES

Definition.—Bankruptcy offences may be defined as statutory offences in which the making of a receiving order or an order of adjudication is a necessary ingredient of the crime.

In general the receiving order or adjudication must have resulted from a petition, as the sections relating to offences are excluded from operation when a receiving order is made on a judgment summons in lieu of committal (*mm*). In certain offences, however, reference is made to receiving orders made on judgment summons, therefore in these cases which are noted it is sufficient if bankruptcy has come about in that way.

Classification.

They may be classified under four heads:

- (1) Antecedent conduct by the debtor which the making of a receiving order erects into an offence.

It will be noted that the same acts committed after a receiving order has been made are often still an offence.

- (2) Subsequent conduct by the debtor connected with his bankruptcy.
- (3) Subsequent conduct by the debtor in relation to matters not connected with his bankruptcy. These impose a disability enforced by criminal sanctions on the bankrupt, and have been sufficiently dealt with under the effect of an order of adjudication (*n*).
- (4) Offences committed by persons other than the debtor in connection with a bankruptcy.

As well as the above four classes we must also examine another class, since it is enacted in the Bankruptcy Act, 1914:

(*l*) B.A. s. 49.

(*n*) See *ante*, p. 104.

(*m*) B.R. Appendix Form 137.

(*mm*) See *post*, p. 326.

- (5) Offences in connection with the incurring of or avoiding the discharge of liabilities that may also be committed by persons who have had no bankruptcy proceedings against them.

As anyone can commit these, apart from a bankruptcy, they are not bankruptcy offences.

What Intent Necessary in Bankruptcy Offences.—It will be noted that in many bankruptcy offences, although fraudulent intent is an ingredient of the offence, such intent need not be proved by the prosecution, but the onus is shifted and the fraudulent intent is presumed unless the defendant proves that he had no such intent. In five offences (*i.e.* the two that constitute Class 3 above and three of Class 1) the actual words of the statute enacting the offences do not specify any wrong intent as a necessary ingredient to the offence. S. 164 (3), which applies to all misdemeanours under the Bankruptcy Act, 1914, states that when a person is charged before a court of summary jurisdiction, "the court shall take in consideration any evidence . . . tending to show that the act . . . was not committed with a guilty intent." The word "charged" is wide enough to cover committal for trial by indictment as well as conviction on summary procedure. It would therefore seem that guilty intent must be proved to sustain a conviction. And so the Common Serjeant held in *R. v. Phillips* (o), that as regards s. 157 (1) (c) this was the effect of s. 164 (3). But later, in *R. v. Duke of Leinster* (p), a case where, in a transaction through an agent, credit was obtained without disclosing bankruptcy, although the bankrupt had instructed the agent to disclose it and the bankrupt had reasonable grounds for believing that the agent had done so, the Court of Criminal Appeal upheld the conviction. It might be said that, as Class 3 offences throw a duty on the bankrupt to disclose his bankruptcy, there is guilty intent in failing to see personally that the disclosure has been made. But the Court of Criminal Appeal have gone farther, and with reference to the defence that the omission to keep proper books "was honest and excusable," have held that the omission, though honest, may not be excusable (q). "Honesty" and "guilty intent" to any but the most refined minds are mutually incompatible. The Court of Criminal Appeal, of course, cannot have overruled s. 164 (3), but they

(o) (1921), 85 J.P. 120.

(p) [1924] 1 K.B. 311.

(q) *R. v. Dandridge* (1931), 22 Cr. App. Rep. 156.

appear to have reduced the minimum of intent required in those cases in which the intent is not specified in the definition of the offence to a microscopic quantity.

ANTECEDENT CONDUCT

Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made is guilty of a misdemeanour:

Where the Prosecution must Prove Fraudulent Intent

- (1) If, after the presentation of a bankruptcy petition by or against him or within twelve months next before such presentation,

(i) he fraudulently removes any part of his property to the value of £10 or upwards (r);

(ii) he fraudulently parts with, alters, or makes any omission, or is privy to the fraudulently parting with, altering, or making any omission in any document affecting or relating to his property or affairs (s);

- (2) If, within twelve months next before the presentation of a bankruptcy petition by or against him or in the case of a receiving order made under s. 107 (t), before the date of the order, or after the presentation of a petition and before the making of a receiving order,

he, by any false representation or other fraud, has obtained any property on credit and has not paid for the same (v) [5 years' penal servitude].

Where Fraudulent Intent is Presumed unless Negatived by Defence

- (1) If, after the presentation of a bankruptcy petition by or against him or within twelve months next before such presentation,

(i) he conceals any part of his property to the value of £10 or upwards, or he conceals any debt due to or from him, unless he proves that he had no intent to defraud (x);

(r) B.A. s. 154 (1) (5) amended by B.A. 1926. Proof by the prosecution of concealment or removal is sufficient to establish *prima facie* fraud; the onus then shifts on to the bankrupt to show that he had no intent to defraud (*R v Governor of Brixton Prison, ex p Shute*, [1926] 1 K B 127).

(s) B.A. s. 154 (1) (11) amended by B.A. 1926.

(t) i.e. on a judgment summons see *post*, p. 326.

(v) B.A. s. 154 (1) (13) amended by B.A. 1926.

(x) B.A. s. 154 (1) (4) amended by B.A. 1926.

- (ii) he conceals, destroys, mutilates or falsifies or is privy to the concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs, or to defeat the law (y);
- (iii) he makes or is privy to the making of any false entry in any book or document affecting or relating to his property or affairs, unless he proves that he had no intent to conceal his affairs, or to defeat the law (z);
- (2) If, within twelve months next before the presentation of a bankruptcy petition by or against him or in the case of a receiving order made on a judgment summons, before the making of the order, or after the presentation of a bankruptcy petition, and before the making of a receiving order,
- (i) he obtains, under the false pretence of carrying on a business and, if a trader, of dealing in the ordinary way of his trade, any property on credit, and has not paid for the same, unless he proves that he had no intent to defraud (a) [5 years' penal servitude];
- (ii) he pawns, pledges, or disposes of any property which he has obtained on credit and has not paid for, unless in the case of a trader, such pawning, pledging or disposing is in the ordinary way of his trade, and unless in any case he proves that he had no intent to defraud (b) [5 years' penal servitude].

Such person is guilty of a felony:

- (3) If, after the presentation of a bankruptcy petition by or against him or within six months before such presentation,
- he quits England and takes with him, or attempts or makes preparations to quit England and take with him, any part of his property to the amount of twenty pounds or upwards, which ought by law to be divided amongst his creditors, unless he proves that he had no intent to defraud (c).

(1) B.A. s. 154 (1) (9) amended by B.A. 1926.

(2) B.A. s. 154 (1) (10) amended by B.A. 1926.

(a) B.A. s. 154 (1) (14) amended by B.A. 1926.

(b) B.A. s. 154 (1) (15) amended by B.A. 1926.

(c) B.A. s. 159.

Fraudulent Intent is not specifically made an Ingredient of this Offence.—Such person is guilty of a misdemeanour:

- (1) If, after the presentation of a bankruptcy petition by or against him, or at any meeting of his creditors within twelve months next before such presentation, he attempts to account for any part of his property by fictitious losses or expenses (*d*);
- (2) If, having been engaged in any trade or business, and having outstanding at the date of the receiving order any debts contracted in the course and for the purposes of such trade or business,
 - (i) he has, within two years prior to the presentation of the bankruptcy petition, materially contributed to or increased the extent of his insolvency by gambling or by rash and hazardous speculations, and such gambling or speculations are unconnected with his trade or business; or
 - (ii) has, between the date of the presentation of the petition and the date of the receiving order, lost any part of his estate by such gambling or rash and hazardous speculations as aforesaid; or,
 - (iii) on being required by the Official Receiver at any time, or, in the course of his public examination, by the court, to account for the loss of any substantial part of his estate incurred within a period of a year next preceding the date of the presentation of the bankruptcy petition, or between that date and the date of the receiving order, fails to give a satisfactory explanation of the manner in which such loss was incurred.

In determining whether any speculations were rash and hazardous, the financial position of the accused person at the time when he entered into the speculations shall be taken into consideration (*e*).

The above three offences relating to gambling apply to a debtor against whom a receiving order is made on a judgment summons, and in such a case the making of the receiving order is substituted for the presentation of the petition (*f*). In all cases there can be no prosecution except under an order of the court (*g*).

(*d*) B.A. s. 154 (1) (12) amended by B.A. 1926.

(*f*) B.A. s. 157 (3).

(*e*) B.A. s. 157 (1).

(*g*) B.A. s. 157 (2).

- (3) If, having been engaged in any trade or business during any period in the two years immediately preceding the date of the presentation of the bankruptcy petition, he has not kept proper books of account throughout that period and throughout any further period in which he was so engaged between the date of the presentation of the petition and the date of the receiving order, or has not preserved all books of account so kept. But a person who has not kept or has not preserved such books of account shall not be convicted of an offence under this section.

(i) if his unsecured liabilities at the date of the receiving order did not exceed, in the case of a person who has not on any previous occasion been adjudged bankrupt or made a composition or arrangement with his creditors, £500, or in any other case £100; or

(ii) if he proves that in the circumstances in which he traded or carried on business the omission was honest and excusable (*h*).

For the above purposes a person is deemed not to have kept proper books of account if he has not kept such books or accounts as are necessary to exhibit or explain his transactions and financial position in his trade or business, including a book or books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, statements of annual stock-takings, and (except in the case of goods sold by way of retail trade to the actual consumer) accounts of all goods sold and purchased showing the buyers and sellers thereof in sufficient detail to enable the goods and the buyers and sellers thereof to be identified (*i*).

A prosecution under this section can only take place under an order of the court (*k*).

S. 154 (1) (9), (10), (11) (*l*) in their application to such books have effect as if "two years next before the presentation of the bankruptcy petition" were substituted for the time mentioned in those provisions as the time prior to the presentation within which the acts or omissions

(*h*) B.A. s. 158 (1) as amended by B.A. 1926, s. 7.

(*i*) B.A. s. 158 (3) as amended by B.A. 1926, s. 7.

(*k*) B.A. s. 158 (2).

(*l*) See pp. 310, 311.

specified in those provisions constitute an offence (*m*). This again is an offence if the receiving order is made on a judgment summons, and as in the gambling offences, the making of the receiving order is then substituted for the presentation of the petition (*n*).

SUBSEQUENT CONDUCT

Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made is guilty of a misdemeanour:

Where Fraudulent Intent Presumed unless Negatived by Defence.

- (1) If he does not to the best of his knowledge and belief fully and truly discover to the trustee all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of his trade (if any) or laid out in the ordinary expense of his family, unless he proves that he had no intent to defraud (*o*);
- (2) If he does not deliver up to the trustee, or as he directs, all such part of his real and personal property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud (*p*);
- (3) If he does not deliver up to the trustee, or as he directs, all books, documents, papers and writings in his custody or under his control relating to his property or affairs, unless he proves that he had no intent to defraud (*q*);
- (4) If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud (*r*);
- (5) If, after the presentation of a bankruptcy petition by or against him, he prevents the production of any book, document, paper, or writing affecting or relating to his property or affairs, unless he proves that he had no intent to conceal the state of his affairs or to defeat the law (*s*).

(*m*) B.A. s. 158 (4).

(*o*) B.A. s. 154 (1) (1).

(*q*) B.A. s. 154 (1) (3).

(*s*) B.A. s. 154 (1) (8).

(*n*) B.A. s. 158 (5).

(*p*) B.A. s. 154 (1) (2).

(*r*) B.A. s. 154 (1) (6).

Where the Prosecution must prove Fraudulent Intent.

- (1) If, knowing or believing that a false debt has been proved by any person under the bankruptcy, he fails for the period of a month to inform the trustee thereof (*t*);
- (2) If he is guilty of any false representation or other fraud for the purpose of obtaining the consent of his creditors or any of them to an agreement with reference to his affairs or to his bankruptcy (*u*).

CONDUCT BY PERSONS OTHER THAN THE DEBTOR CONNECTED
WITH BANKRUPTCY

- (1) If any creditor, or any person claiming to be a creditor, in any bankruptcy proceedings, wilfully and with intent to defraud makes any false claim, or any proof, declaration or statement of account which is untrue in any material particular, he is guilty of a misdemeanour [one year's imprisonment with or without hard labour] (*v*).
- (2) Where the debtor is guilty of the offence of pawning property obtained on credit and not paid for (*x*), the recipient if he knows of the circumstances is also guilty of a misdemeanour (*y*).

Offences that any Person can Commit.—By the Debtors Act (*z*) any person whatsoever, and by the Bankruptcy Act (*a*) any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made is guilty of a misdemeanour if:

- (a) in incurring any debt or liability he has obtained credit under false pretences or by means of any other fraud;
- (b) with intent to defraud his creditors or any of them he has made or caused to be made any gift or transfer of, or charge on, his property;
- (c) with intent to defraud his creditors he has concealed or removed any part of his property since, or within two months before the date of any unsatisfied judgment or order for payment of money obtained against him; [one year's imprisonment with or without hard labour in each case].

(*t*) B.A. s. 154 (1) (7).

(*u*) B.A. s. 154 (1) (16).

(*v*) B.A. s. 160.

(*x*) B.A. s. 154 (1) (15), *ante*, p. 311.

(*y*) B.A. s. 154 (3) added by B.A. 1926, s. 5.

(*z*) Debtors Act, 1869, s. 13.

(*a*) B.A. s. 156.

In the case only of a person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made, if he has, with intent to defraud his creditors, or any of them, caused or connived at the levying of any execution against his property, he is deemed to have made a transfer or charge on his property, and is accordingly guilty of a misdemeanour (*b*).

The expression "trustee" which occurs in several offences (*c*), includes not only the trustee administering the debtor's estate, but also the Official Receiver of his estate (*d*).

Court May Order Prosecution.—Where the Official Receiver or trustee reports to the court that the debtor has, in his opinion, been guilty of an offence under the Act, or the court is satisfied on the representation of a creditor or member of the committee of inspection that there is ground for belief that the debtor has been guilty of such an offence, then, if it appears to the court both that there is a reasonable probability that he will be convicted and that the circumstances render a prosecution desirable, the court must order a prosecution (*dd*). Since the Bankruptcy Act, 1926, the court has no power to commit for trial (*e*).

Who Prosecutes under such Order.—If the Court orders a prosecution, the Director of Public Prosecutions must institute it and carry it on, unless the order was based on the Official Receiver's report and was made on his application, in which case the Board of Trade either themselves or through the Official Receiver, may institute and carry on the proceedings if and so long as they are before a court of summary jurisdiction unless circumstances arise which in the opinion of such court or the Board of Trade render it desirable that the remainder of the proceedings should be carried on by the Director of Public Prosecutions (*f*).

Discharge or Composition.—Neither the discharge of the debtor nor the acceptance by his creditors of a composition or scheme of arrangement exempts a debtor from liability to prosecution (*g*).

In what Court may a Prosecution take place.—A person guilty

(*b*) B.A. 1926, s. 6.

(*d*) B.A. s. 154 (1).

(*e*) B.A. 1926, s. 9.

(*g*) B.A. s. 162.

(*i*) *i.e.* B.A. s. 154 (1) paras. (1), (2) and (3).

(*dd*) B.A. s. 161.

(*f*) B.A. s. 165.

of an offence under the Act may be prosecuted either summarily or by way of indictment.

Time Limit on Summary Proceedings.—Summary proceedings for any offence under the Act may not be instituted after one year from the first discovery thereof either by the Official Receiver or by the trustee in bankruptcy, or, if the proceedings are instituted by a creditor, the discovery by him, nor in any case after three years from the commission of the offence (j).

Punishment.—Except in those cases in which the maximum punishment is set out above in brackets after the offence, the maximum on conviction on indictment is two years' imprisonment with or without hard labour, or on summary conviction, twelve months (k).

(j) B.A. s. 164 (2).

(k) B.A. s. 164 (1) amended B.A. 1926, s. 10.

CHAPTER 15

REHEARING AND APPEALS

REHEARING

BEFORE considering appeals it is necessary to consider the power given to the Court by s. 108 (1) to

“review, rescind or vary any order made by it under its bankruptcy jurisdiction.”

It must be noted in the first place that where the Court makes an order in relation to a bankruptcy under some other Act or jurisdiction, and not under its bankruptcy jurisdiction, this power to review such order does not exist (*a*); and secondly, only the Court actually making the order can exercise this power, and therefore a judge cannot review an order of the registrar (*b*): “The granting of a rehearing is a matter of indulgence and must be properly guarded, otherwise parties would gain by indirect means the benefit of an appeal after the time for appealing had expired” (*c*), and a person interested might be gravely affected through lapse of time or loss of evidence.

But in a proper case this power is without limit, and, if special grounds are shown, the Court will rehear even a petition that has been dismissed after the time for appealing has expired (*d*).

APPEALS

Who may Appeal.—The right of appeal may be exercised in bankruptcy matters at the instance of any “person aggrieved” by the order. It is necessary, for an appeal to succeed, for the appellants to prove that they are “persons aggrieved” as well as that the order is wrong (*e*).

In *Re Kitson* the appellants, who had commenced an administration action in the Chancery Division, appealed successfully against an order for the administration of the deceased’s

(a) *Re Suffield and Watts* (1888), 20 Q.B.D. 693.

(b) *Ex p. Maugham* (1888), 21 Q.B.D. 21.

(c) *Per Lord CAIRNS*, L.C., in *Ex p. Brown* (1874), 9 Ch. App., at p. 307.

(d) *Ex p. Ritso* (1883), 22 Ch. D. 529.

(e) *Re Kitson*, [1911] 2 K.B. 109.

estate in bankruptcy (*f*) which had been wrongfully made. Although they were not parties to the order appealed against they were held to be "persons aggrieved," as it would deprive them of the fruits of litigation that they had rightfully initiated.

But although it is not necessary to be a party to the original order

"the words 'person aggrieved' do not mean a man who is "disappointed of a benefit which he might have received if "some other order had been made. A person aggrieved must "be a man against whom a decision has been pronounced which "has wrongfully deprived him of something, or wrongfully "refused him something, or wrongfully affected his title to "something" (*g*).

Many decisions applying the above principles have been given as to who is and who is not aggrieved by an order; a modern example is *Re J. Burn* (*h*).

The Court to which Appeal Lies.—This varies:

(i) Where the order is made by a County Court an appeal shall lie to a Divisional Court of the High Court, of which the judge to whom bankruptcy business is for the time being assigned shall, for the purpose of hearing any such appeal, be a member.

The decision of the Divisional Court upon such an appeal shall be final and conclusive, unless in any case the Divisional Court or the Court of Appeal sees fit to give special leave to appeal therefrom to the Court of Appeal, whose decision in such case shall be final and conclusive.

But even with leave, no appeal lies to the Court of Appeal from an order of the Divisional Court extending the time for appealing from the County Court by reason of the general prohibition of such appeals in s. 1 (1) (*a*) of the Judicature (Procedure) Act, 1894, now Judicature (Consolidation) Act, 1925, s. 31 (1) (*b*) (*i*).

(ii) Where the order (not being an order on appeal from a County Court) is made by the High Court, an appeal lies to the Court of Appeal (*j*), except that no such appeal shall be brought from an omission to exercise a discretionary power unless the discretion has been asked for and refused (*k*), or without leave

(*f*) See p. 322.

(*g*) *Per* JAMES, L.J., in *Ex p. Sidebotham* (1880), 14 Ch. D. 458, at p. 465.

(*h*) [1932] 1 Ch. 247.

(*i*) *Re A Debtor*, [1911] 1 K.B. 841.

(*j*) B.A. s. 108 (2) (*b*).

(*k*) B.R. 129 (*b*).

of the Court of Appeal from any order made by consent, or as to costs only, or relating to property when it is apparent from the proceedings that the money's worth involved does not exceed £50 (*l*); by this is meant the amount involved on appeal, not that involved in the Court of first instance (*m*).

Subject to power of the Court of Appeal to extend the time, appeals to the Court of Appeal must be brought within twenty-one days of the time when the order is signed, entered, or otherwise perfected, or, in the case of a refusal of an application, from the date of such refusal (*n*).

(iii) An appeal lies, with the leave of the Court of Appeal, but not otherwise, from the decisions of that Court to the House of Lords, but no appeal lies to that House from an order of the Court of Appeal giving or refusing such leave (*o*), or from an order made in a case originating in the County Court.

When a receiving order is made on appeal it is dated as on the day when it ought to have been made in the Court of first instance (*p*), but for the purpose of s. 45 (protection of transactions with third parties (*q*)), it is the date on which it was actually made, not the date it bears, that is the crucial date (*r*).

(iv) Appeals lies in certain cases to the High Court from the decision of the Board of Trade or Official Receiver. These appeals must be brought within twenty-one days from the time when the decision appealed against is pronounced or made.

Instances of these appeals are:

Board of Trade objections to person appointed trustee (*s*).

Board of Trade Orders releasing trustee (*t*).

Board of Trade Orders removing trustee (*u*).

Board of Trade Orders relating to claims to unclaimed and undistributed funds (*v*).

(v) Appeals from the decisions of the Official Receiver relating to admission, rejection, or to the expunging of proof of debt, lie to the Court dealing with the bankruptcy, either the High Court or the County Court, as the case may be.

(*l*) B.R. 129 (*a*).

(*n*) B.R. 130.

(*p*) *Re Teale*, [1912] 2 K.B. 367.

(*r*) *Re Teale*, *supra*.

(*t*) B.A. s. 93; see p. 125, *ante*.

(*v*) B.A. s. 153; see p. 320, *ante*.

(*m*) *Re Arnold*, [1914] 3 K.B. 1078.

(*o*) *Lane v. Esdaile*, [1891] A.C. 210.

(*q*) See p. 136, *ante*.

(*s*) B.A. s. 19 (2), (3); see p. 115, *ante*.

(*u*) B.A. s. 95; see p. 118, *ante*.

CHAPTER 16

SPECIAL CASES ADMINISTERED IN BANKRUPTCY

THERE are three cases in which estates are administered in bankruptcy besides the normal which has been dealt with so far, and one case which, although administered by the County Court in its ordinary jurisdiction, gives the debtor practically equivalent protection. They are:

- (1) Summary cases.
- (2) Administration of deceased insolvent estates.
- (3) Receiving order made on a judgment summons.
- (4) Administration orders.

The first two are initiated by a petition, the latter in other ways.

SUMMARY CASES

Where a petition is presented by or against a debtor, if the Court is satisfied, by affidavit or otherwise, or the Official Receiver reports to the Court, that the property of the debtor is not likely to exceed in value £300, the Court may make an order that the debtor's estate be administered in a summary manner, and thereupon the provisions of the Act shall be subject to the following modifications:

- (1) If the debtor is adjudged bankrupt the Official Receiver shall be trustee in the bankruptcy;
- (2) There shall be no committee of inspection, but the Official Receiver may do, with the permission of the Board of Trade, all things which may be done by the trustee with the permission of the committee of inspection;
- (3) Such other modifications may be made in the provisions of the Act as may be prescribed by general rules with the view of saving expense and simplifying procedure; but nothing in this section shall permit the modification of the provisions of this Act relating to the examination or discharge of the debtor;

Provided that the creditors may at any time, by special resolution, resolve that some person other than the Official Receiver be appointed trustee in the bankruptcy, and thereupon the bankruptcy shall proceed as if an order for summary administration had not been made (a).

The principal modifications in procedure are:

- (1) No advertisement in a local paper unless the Board of Trade otherwise directs;
- (2) All questions of law and fact are determined by the Court, and there is no right to a jury, but this does not affect the rights of strangers (b).
- (3) If the debtor does not lodge or intend to lodge a composition or scheme of arrangement, or if such scheme is not approved, or he has absconded, the Court may forthwith adjudge the debtor bankrupt;
- (4) The first meeting of creditors may be held on the day appointed for the public examination, or on any other day fixed by the Official Receiver, and if no quorum is present the meeting need not be adjourned;
- (5) Notices of meetings other than first meetings, or of sittings of the Court, or of an application by the bankrupt for discharge, are sent only to creditors whose debts exceed £2;
- (6) The estate shall be realised with all reasonable despatch, and, where practicable, distributed in a single dividend, and the normal period of four months for the first dividend is extended to six months (c).

ADMINISTRATION OF DECEASED INSOLVENTS

Who may Petition.—Any creditor of a deceased debtor whose debt, which must have been incurred before the death of the debtor (d), would have been sufficient to support a bankruptcy petition against the debtor, had he been alive, may present to the Court within whose jurisdiction the debtor resided or carried on business for the greater part of the six months immediately prior to his decease (e) a petition in prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of

(a) B.A. s. 129.

(b) *Re Billing* (1902), 86 L.T. 689, and see p. 39, *ante*.

(c) B.R. 298.

(d) *Re Kitson*, [1911] 2 K.B. 109.

(e) B.A. s. 130 (10).

bankruptcy (f). A like petition may be presented by the debtor's legal personal representative (g).

When Order can be Made.—Upon service on each of the legal personal representatives of the deceased debtor, who has proved the will or taken out letters of administration, and on such other person as the Court thinks fit, the Court may, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payments of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may, upon cause shown, dismiss the petition, with or without costs (h).

The Court's discretion to make or refuse such an order is the same as its discretion to make a receiving order on a petition against a living debtor (i).

Where a Petition will not Lie.—A petition for such administration shall not be presented to the Court after proceedings have been commenced in any Court of Justice for the administration of the deceased debtor's estate, but that Court may, when satisfied that the estate is insufficient to pay its debts, transfer the proceedings to the Court exercising jurisdiction in bankruptcy, and thereupon the last-mentioned Court may make an order for the administration of the estate of the deceased debtor, and the like consequences shall ensue as under an administration order made on the petition of a creditor (j).

Procedure.—Where it appears to the Court, on the report of the Official Receiver, that no executor or legal personal representative exists, such statement shall be made, verified, and lodged by such person as, in the opinion of the Court, upon such report, may have taken upon himself the administration of, or may otherwise have intermeddled with, the property of the deceased, or any part thereof (k).

Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made

(f) B.A. s. 130 (1), and Expiring Laws Continuance Act, 1925.

(g) B.A. s. 130 (9).

(h) B.A. s. 130 (2) and B.R. 301.

(i) *Re Outram* (1893), 10 Morr. 288. (j) B.A. s. 130 (3).

(k) B.R. 303.

by the legal personal representative shall operate as a discharge to him as between himself and the Official Receiver or trustee: save as aforesaid this shall not invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration (*l*).

Where an administration order is made, such order is gazetted and advertised in the same manner as an order of adjudication is gazetted and advertised (*m*).

Creditors' Powers and Effect of Order.—The creditors have the same powers as to the appointment of trustees and committees of inspection as they have in other cases where the estate of a debtor is being administered or dealt with in bankruptcy; but until they exercise these powers, if ever, upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the Official Receiver of the Court, as trustee thereof, and he shall forthwith proceed to realise and distribute it in accordance with the provisions of the Act (*n*).

The effect of these provisions is that, upon the making of such an order, the property vests in the Official Receiver and shall be administered as if the order were an order of adjudication, but the property so vesting is "the property of the deceased, subject to any rights and liabilities which attached to it in his hands" (*o*). Therefore, the rights of third parties are unaffected, and judicial opinion has been expressed that the following provisions that ensue upon an adjudication do not apply:

Sect. 42, the setting aside of voluntary settlement (see p. 202) (*p*).

Sect. 44, which relates to fraudulent preferences (see p. 207, ante) (*q*).

Sect. 40, defeating a creditor who has not completed his execution before the making of a receiving order (see p. 141) (*r*).

A claim by a legal personal representative for funeral and testamentary expenses is made a preferential debt (see p. 276), and, in addition, is payable in full out of the debtor's estate, in priority to all other debts (*s*). The right of retainer of an executor who has received assets prior to the making of the

(*l*) B.A. s. 130 (8).

(*m*) B R 300, and see p. 103, ante.

(*n*) B A. s. 130 (4).

(*o*) *Johnson v. Pickering*, [1908] 1 K B., per FLECHER MOULION, L J., at p. 8.

(*p*) *Ex p Official Receiver* (1887), 19 Q B D. 92

(*q*) *ib. obiter* at p. 95.

(*r*) *Hasluck v. Clark*, [1899] 1 Q.B. 699.

(*s*) B A. s. 130 (6).

order is not affected or diminished (*t*). Where, in ignorance, an executor handed over the assets to the Official Receiver he was held entitled to be repaid the amount he might have retained (*u*).

Where an order of administration has been made, the legal personal representative must lodge with the Official Receiver a statement analogous to a debtor's statement of affairs, and the taxed costs of preparing, verifying, and lodging this are allowed out of the estate (*v*).

But it does not seem that notice of such a petition is equivalent to notice of an act of bankruptcy so as to affect dealings with the debtor's property (see pp. 135 *et seq.*, *ante*), except in the single case of a legal personal representative. Sect. 35 (1), which limits a landlord's power of distress if levied after bankruptcy to six months' rent accrued due prior to the sale of the order of adjudication, and to rent accrued prior to the date of levying distress applies, the date of the order of administration being substituted for date of order of adjudication (*w*).

When the deceased debtor has been bankrupt during his life upon the making of an administration order:

- (1) The trustee in the last preceding bankruptcy shall be deemed to be a creditor in respect of any unsatisfied balance of the debts provable against the property of the bankrupt in that bankruptcy.
- (2) Any property acquired by the debtor since he was last adjudged bankrupt, which, at the date when the subsequent petition was presented, had not been distributed, shall vest in the trustee of the administration, subject to any disposition thereof made by the Official Receiver or trustee in the prior bankruptcy and to s. 47 (see *ante*, p. 221), which protects persons dealing *bonâ fide* and for value with a bankrupt in respect of his after-acquired property.
- (3) Where the trustee in any bankruptcy receives notice of a petition for the administration in bankruptcy of the estate of his bankrupt, the trustee shall hold any property then in his possession which has been acquired by the bank-

(*t*) *Re Williams* (1891), 8 Morr. 65

(*u*) *Re Rhoades*, [1899] 2 Q B. 347. The right of retainer has been extended and modified by the Administration of Estates Act, 1925, s. 34 (2).

(*v*) B R. 302.

(*w*) B.A. s. 130 (5).

rupt since he was adjudged bankrupt until the subsequent petition has been disposed of, and if on the subsequent petition an order for the administration of the estate in bankruptcy is made, he shall transfer all such property or the proceeds thereof (after deducting his costs and expenses) to the trustee in administration in bankruptcy (x).

Surplus.—If, on the administration of the deceased debtor's estate, any surplus remains in the hands of the Official Receiver or trustee, after payment in full of all the debts due from the debtor, together with the costs of the administration and interest as provided in the case of bankruptcy, such surplus shall be paid over to the legal personal representative of the deceased debtor's estate, or dealt with in such other manner as may be prescribed (z).

RECEIVING ORDER MADE ON A JUDGMENT SUMMONS

When such Receiving Order can be Made.—Where a creditor has obtained a judgment which is unsatisfied he may, to enforce payment, issue a summons under s. 5 of the Debtors Act, 1869, called a judgment summons. The Court may thereupon commit the debtor to prison for a period not exceeding six weeks, or make an order for the payment of the debt by instalments, and also, where such judgment summons is issued by a judgment creditor in a Court having bankruptcy jurisdiction, the Court may, if it thinks fit, decline to commit, and in lieu thereof, with the consent of the judgment creditor and on payment by him of the prescribed fee, make a receiving order against the debtor.

The Court can only make a receiving order "in lieu of a committal order" if it has before it materials upon which it could make a committal order (a), that is to say, upon proof to its satisfaction that the debtor has or has had, since the date of the judgment, means to pay at least part of the judgment debt; therefore, unless it has such proof, no receiving order can be made.

Effect of such Receiving Order.—In such case the judgment debtor is deemed to have committed an act of bankruptcy at the time the order is made, and the provisions of

(x) B.A. s. 39 as amended by B.A. 1926, s. 3.

(z) B.A. s. 130 (7).

(a) *Re A Debtor*, [1905] 1 K.B. 374.

the Act, except Part VII, which relates to bankruptcy offences, apply as if for references to the presentation of the petition by or against a person there were substituted references to the making of such a receiving order (b). Although the section excepts Part VII without qualification, express reference is made in *seven offences enacted* in Part VII (c) to receiving orders made under this section; it would therefore seem that these *seven* can be committed when the receiving order is made on a judgment summons.

Where such a receiving order is made, the bankruptcy of the debtor shall be deemed to have relation back to, and to commence at, the time of the order, or if the bankrupt is proved to have committed any previous act of bankruptcy, then to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the debtor within three months next preceeding the date of the order (d).

Where a receiving order is made on a judgment summons, s. 44, which avoids fraudulent preferences against the trustee in bankruptcy, applies as if the debtor had been adjudged bankrupt on a bankruptcy petition presented at the date of the receiving order (e).

Aliens.—A receiving order can be made against a judgment debtor who is properly before the Court if he is a foreigner and is not resident or has no dwelling or place of business so that a petition could be filed against him (f).

ADMINISTRATION ORDERS

These orders give a small debtor a protection practically equivalent to an ordinary bankruptcy in a simpler form. As the debtors generally manage them themselves, with the help of County Court judges, registrars, and officials, they will only be dealt with here very briefly (g).

When an Administration Order can be Made.—Where a judgment has been obtained in a County Court, and the debtor is unable to pay the amount forthwith, and alleges that his whole

(b) B.A. s. 107 (4).

(c) B.A. s. 154 (1), paras. 13, 14 and 15 and sects. 157 and 158.

(d) B.A. s. 37 (2). For the doctrine of relation back, see Chap. 6.

(e) B.A. s. 44 (3).

(f) *Re Clark*, [1898] 1 Q.B. 20. Also see pp. 42, 44, ante.

(g) For further details the reader is referred to the current yearly volume of New County Court Practice.

indebtedness amounts to a sum not exceeding £50, inclusive of the debt for which the judgment is obtained, the County Court may make an order providing for the administration of his estate, and for the payment of his debts by instalments or otherwise, and either in full or to such extent as to the County Court under the circumstances of the case appears practicable, and subject to any conditions as to his future earnings or income which the Court may think just (*h*).

Where an application to commit is made to a County Court, the Court, in lieu of making a receiving order (see previous section of this chapter), may make an administration order if

- (a) It appears that the total debts do not exceed £50, and
- (b) It thinks that a committal order ought not to be made (*i*).

As such an order is in lieu of making a receiving order, the conditions enabling a receiving order to be made (*i.e.* ability to commit by reason of proof of means and refusal to pay) must exist.

The fact that the total debts are found to exceed £50 does not of itself invalidate the order, but the Court has a discretion to set it aside (*j*).

Procedure.—The proceedings are initiated by the filing of a request for the order (*k*). This is verified by affidavit, and it incorporates a statement of the debts owing by the debtor, and, if there are any County Court or inferior Court judgments or summonses against him, he must produce these to the registrar, and also state whether he intends to pay in full or pay a composition and also the amount of the monthly or other instalments (*l*).

The registrar gives notice to all creditors scheduled in the request of its being filed and the date of hearing (*m*).

By rule 5 any creditor to whom notice has been sent may object to any debt scheduled, or to the amount of the composition or instalments, and should give five clear days' notice of his objection to the registrar, the debtor, and, if applicable,

(*h*) County Courts Act, 1934, s. 149, sub-ss. (1) and (4).

(*i*) B.R. 1886 i. 358.

(*j*) County Courts Act, 1934, s. 149 (3).

(*k*) Administration Order Rules, 1936 (hereinafter cited as B. (A.O.) R.), r. 2.

(*l*) B. (A.O.) R. r. 3 (1), (2), (3), and (4).

(*m*) B. (A.O.) R. r. 4.

the other creditors, although the judge has power to hear the objection if this has not been done (*n*).

Interim Orders.—The Court may thereupon stay all proceedings against the debtor in respect of any debt scheduled in the request, and may allow any costs already incurred to be added to the scheduled debt, and a day is appointed for the hearing of the request; and likewise any other Court, in which proceedings against the debtor have been issued, may in like manner stay all action on them until the hearing of the request, and likewise allow the costs already incurred to be added to the debt (*o*).

If the judge is of opinion that it would be inconvenient to administer the order in that Court he can direct that the request and certificate of the judgment be forwarded to the Court in whose district the debtor or the majority of his creditors reside, and thereupon the latter Court shall proceed as if the request had originally been filed therein (*p*).

The Hearing.—Upon the request coming on for hearing the proceedings are as follows:

- (1) The debtor shall attend in person, unless the Court otherwise directs.
- (2) Any creditor, whether he has received a notice of the request or not, may attend the hearing thereof and prove his debt, and, subject to the provisions of r. 5, object to any debt, or to the amount of the composition or instalments which the debtor proposes to pay.
- (3) All debts set out in the list attached to the request shall be taken to be proved unless objected to by a creditor or disallowed by the judge.
- (4) All creditors whose debts are objected to, either by the debtor or by any other creditor, shall prove their debts in like manner as upon the hearing of an ordinary summons, provided that the judge may in his discretion direct the proof of any debt to be adjourned upon any terms that he may think fit, and may thereupon either adjourn the further consideration of the application or proceed to determine the same, in which latter case such debt, if and when proved, shall be added to the schedule of proved debts.

(*n*) County Courts Act, 1934, s. 150 (c) and B. (A.O.) R. r. 5.

(*o*) B. (A.O.) R. r. 6 (1), (2) and (4)

(*p*) B. (A.O.) R. r. 4 (2) and County Courts Act, 1934, s. 149 (2).

- (5) The debtor shall answer all questions put or allowed by the judge.
- (6) Any creditor whose debt is admitted or who has proved, and by leave of the judge any creditor the proof of whose debt has been adjourned, and, with the like leave, any other person on behalf of any such creditor, shall be entitled to be heard and to adduce evidence.
- (7) Where any facts are proved on proof of which the Court exercising jurisdiction in bankruptcy would be required either to refuse, suspend, or attach conditions to the debtor's discharge if he were adjudged bankrupt, the judge may refuse to make an administration order.
- (8) No administration order shall be made under which the payment of instalments, if kept up without default, would extend over a period of more than six years from the date of the order.
- (9) On the hearing the judge can order the request and certificate of judgment to be forwarded to another Court for the same reasons as he could before the hearing, with the like effect (*q*).

After an administration order has been made, a creditor, subject to certain limitations, may apply to the judge to allow him to make the same objections as at the hearing (*r*).

Execution on Debtor's Property.—Where it appears to the registrar of the County Court that property of the debtor exceeds in value £10, he shall, at the request of any creditor and without fee, issue execution against the debtor's goods, but the household goods, wearing apparel, and bedding of the debtor or his family, and the tools and implements of his trade to the value in the aggregate of £20, shall, to that extent, be protected from seizure (*s*).

All moneys paid under an administration are paid into Court, and are appropriated:

- first, in satisfaction of the costs of the plaintiff in the action,
- secondly, in satisfaction of the cost of administration (which shall not exceed 2s. in the £ on the total amount of the debts),
- and
- thirdly, in liquidation of debts in accordance with the order (*t*).

(*q*) B. (A.O.) R. r. 9.

(*r*) B. (A.O.) R. r. 11.

(*s*) County Courts Act, 1934, s. 152.

(*t*) *ibid.*, s. 154 and B. (A.O.) R. 1. 22.

Any creditor of the debtor, on proof of his debt before the registrar, shall be entitled to be scheduled as a creditor of the debtor for the amount of his proof. Notice is given to the debtor to enable him to object (*u*).

Any person who, after the date of the order, becomes a creditor of the debtor shall, on proof of his debt before the registrar, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until those creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order (*v*), and like prior creditors he has no other remedy except with leave of the County Court (*w*).

All persons becoming creditors after the date of the order and scheduled as creditors before the order is superseded shall rank *pari passu inter se*, subject to the priority given to those creditors who are scheduled as being creditors before the date of the order, but no payment by way of dividend or otherwise shall be disturbed by reason of the subsequent proof by any such other creditor (*x*).

Enforcement.—Default in the payment of any instalment is enforced by judgment summons, issued without fee at the instance of the person having conduct of the order, and if the debtor makes any such default he shall be deemed, unless the contrary is proved, to have had since the date of the order the means to pay the sums in respect of which he has made default and to have refused or neglected to pay the same (*y*), and the Judge, if satisfied that the debtor has not had the means to pay the sum in respect of which he has made default, may direct that the administration order shall be deemed to have been suspended during the period covered by the default, or make a new order for the payment of the amount remaining due under the order by instalments (*z*).

Person Responsible for Administration and his Duties.—The judge shall appoint some person to have the conduct of the order, and may at any time afterwards remove him, and appoint any other person in his place.

(*u*) *ibid.*, s. 150 (*b*).

(*v*) County Courts Act, 1934, s. 150 (*d*).

(*w*) *Pearson v. Wilcock*, [1906] 2 K.B. 440.

(*x*) B. (A.O.) R. r. 24.

(*y*) County Courts Act, 1934, s. 155.

(*z*) B. (A.O.) R. r. 16.

It shall be the duty of any person so appointed to take all proper proceedings for enforcing the terms of the order; but in case of his neglect to proceed, or of urgency, any creditor scheduled to the order may by leave of the Court take such proceedings.

In particular, it shall be the duty of the person so appointed

(1) if default is made in payment of any instalment payable in pursuance of the order:

(a) to apply for the issue of a judgment summons under rule 16; or

(b) if it appears that the debtor is unable to pay by reason of illness or other unavoidable misfortune, to apply to the judge or registrar under r. 19 (a).

Rule 19 is as follows: Where it appears that the debtor is unable to pay any instalment, by reason of illness or other unavoidable misfortune, the registrar may from time to time suspend the operation of the order until the next sitting of the Court, and the judge may from time to time suspend the operation of the order for such time as he shall direct, or make a new order for payment by instalments (b).

(2) If any facts become known to such person on which the order might be set aside or rescinded (see below), except the fact that the total liabilities exceed £50, it is his duty to bring such facts to the attention of the judge (c).

The Effect of an Administration Order.—When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a County Court or which has been scheduled to the order, except with the leave of that County Court, and on such terms as that County Court may impose (d); and any County Court or inferior Court in which proceedings are pending against the debtor in respect of any such debt shall, on receiving notice of the order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt notified (e).

A landlord has only the same limited right of distress as in ordinary bankruptcies (f).

(a) B. (A.O.) R. r. 15.

(b) B. (A.O.) R. r. 19.

(c) B. (A.O.) R. r. 15.

(d) County Courts Act, 1934, s. 151 (1).

(e) *ibid.*

(f) *ibid.*, s. 153 and B.A. Sched. VI. See pp. 282, *et seq.*

The order disqualifies the debtor for certain public offices, as it is a "composition" or "arrangement with creditors" (*h*).

The debtor must also notify the registrar of any change of address (*i*).

Rescission of the Order.—An administration order may be set aside or rescinded:

- (1) Upon the hearing of a judgment summons, or
- (2) On the application of any person entitled to enforce the order (see above), or
- (3) On the application of any creditor not scheduled to the order whose debt has been notified to the Court (*j*).

In the last two cases notice must be given to the debtor, so that he may oppose except when the application is made on the grounds that a receiving order has been made against him (*k*).

It may be rescinded by the judge in the following cases:

- (1) Where two or more of the instalments ordered to be paid are in arrears.
- (2) Where the debtor has wilfully inserted in the list attached to his request the wrong name or address of any of his creditors, or has wilfully omitted therefrom the name of any creditor.
- (3) Where the debtor subsequent to the date of the order has obtained credit to the extent of £2 or upwards without informing the creditor that an administration order has been made against him and has not been superseded.
- (4) Where the order has been obtained by fraud or misrepresentation.
- (5) Where a receiving order has, since the date of the administration order, been made against the debtor.

And, apart from these five cases, the judge may rescind the order as previously mentioned if it is proved that the debtor's allegation that his total liabilities do not exceed £50 is false.

In cases where notices have been given to the debtor the judge may either

(*h*) *Bradfield v. Cheltenham Guardians*, [1916] 2 Ch. 371 and see p. 104, *ante*. (i) B. (A.O.) R. r. 29.

(j) B. (A.O.) R. r. 17 (3).

(k) B. (A.O.) R. r. 15 (2) and (3).

- (a) Set aside or rescind the order.
- (b) Suspend the order or make a new order for payment by instalments.
- (c) Make an order directing that the administration be set aside or rescinded unless the debtor pays the sum in payment of which he has made default either within a specified time or by specified instalments. During the time allowed for payment the order is suspended, but if payment is not made during this time allowed the order is rescinded without further notice to the debtor (*l*).

Effect of Rescission.—(1) Where an administration order is set aside or rescinded under Rule 17 it shall be without prejudice to anything already done or suffered under the order.

(2) Any money paid into Court under the order may be dealt with as if the order had not been set aside or rescinded.

(3) Notice that the order has been set aside or rescinded shall be sent by the registrar to the debtor and to every creditor named in the schedule, and to every creditor not scheduled whose debt has been notified to the Court, and to every other County Court or inferior Court in which, to the knowledge of the registrar, judgment had been obtained or proceedings were pending against the debtor at the time when the order was made, in respect of any debts scheduled to the order (*m*).

The Superseding of the Order.—Where the amount received under the order is sufficient to pay each creditor scheduled to the extent thereby provided, and to the costs of the plaintiff and of the administration, the order shall be superseded and the debtor shall be discharged from his debts to the scheduled creditors (*n*).

(*l*) B. (A.O.) R. r. 20.

(*m*) B. (A.O.) R. r. 18.

(*n*) County Courts Act, 1934, s. 156.

CHAPTER 17

PARTNERSHIPS AND LIMITED PARTNERSHIPS

As bankruptcy usually occurs when the debtor is in business, it often happens that the debtor or debtors are in partnership. It is therefore proposed to deal in this chapter with the application of the bankruptcy laws to such cases, and also to the rarer cases of limited partnerships.

PARTNERSHIPS

Before dealing with partners in a state of bankruptcy it is necessary to consider some of the more salient features of their position whilst still solvent.

A partnership is constituted by not more than ten persons in the case of banking, and not more than twenty persons in any other case, joining together for the purpose of business, which may be either of a temporary or more or less permanent nature. They can hold property jointly, and are entitled jointly to the fruits of their success and diligence, but in what shares is regulated by agreement between themselves.

There is nothing but the frailty of human capacity and lack of capital to prevent a man from joining in any number of partnerships at the same time, unless he has bound himself to the contrary by agreement; and besides partnership business a man may engage in any number of private transactions that he chooses.

Each partner is the agent of each and all the other partners in relation to all partnership business. The liability of all partners is joint and several on all partnership transactions, that is to say, that each partner is individually liable to pay the whole amount of every partnership debt, although, if he does so, he is entitled to be indemnified out of the partnership assets and by his partners up to the amount of their shares. But a partner who has retired from the firm remains responsible for all undischarged liabilities that were incurred before his retirement. Such liability may be discharged either by payment or by "novation," *i.e.* where the creditor is by express agreement or from the circumstances deemed to have accepted the

liability of the new firm or continuing partners in substitution for the liability of the old partners.

In order that the bankruptcy of one or more such persons should work justly, it is obvious that special provisions must be made for the various cases that can occur.

With this rough outline of a partner's position in mind, it is now proposed to deal with these special provisions. It must not be forgotten, however, that there can be joint adventures that do not amount to partnership, and in such cases the law relating to partners, whether solvent or insolvent, does not apply, and it is doubtful if they can be petitioned against jointly on a debt jointly incurred in the adventure, but the creditors of the adventure may have the assets of that adventure primarily applied in the payment of their debts (*a*).

Acts of Bankruptcy.—Acts of bankruptcy by partners are, in general, the same as those by separate debtors. But the considerations that apply to partners in some cases differ from those that apply to separate debtors as to what assignments are fraudulent so as to constitute an act of bankruptcy.

An assignment of all a partner's separate property or an assignment to the continuing partners by an outgoing partner of his share in the business, although it is substantially all his property, is not necessarily an act of bankruptcy (*b*). The test is the *bona fides* of the transactions. Two cases will suffice to illustrate this.

In *Ex p. Walker* (*c*), soon after the formation of a partnership between H. and W., H. drew from the partnership banking account a large sum and applied it to his own purposes; W. insisted on dissolution, and H.'s share was assigned to W., charged, in the first place, with the replacement of the sum misappropriated, and, after that, the assets should be realised and administered for the benefit of H. and W. according to their shares. Shortly afterwards both H. and W. became bankrupt.

Held, that the assignment was not an act of bankruptcy, and the joint estate had thereby been converted into the separate estate of W.

In *Ex p. Mayou* (*d*), the partners, W. and G., were in difficul-

(*a*) *Ex p. Dewhurst* (1873), 8 Ch App. 965.

(*b*) *Abbott v. Burbage* (1836), 2 Bing N.C. 444 and *Ex p. Walker* (1862), 31 L. J. Bcy 69.

(*c*) *Supra*.

(*d*) (1865), 34 L.J. Bcy 25.

ties, and were both insolvent separately and in respect of the partnership. G. in these circumstances assigned all his interest in the partnership to W., who undertook to pay the partnership debts.

It was held that the assignment was fraudulent, and that the joint creditors were entitled to the assets comprised in the assignment.

Partners can commit a joint act of bankruptcy, *e.g.* in departing from their dwelling-house or otherwise absenting themselves (*e*), or by jointly executing a deed for the benefit of their creditors (*f*), or as a firm failing to comply with a bankruptcy notice (*g*).

The question as to how far an act of bankruptcy can be committed by an agent may obviously arise in partnerships, but the same principles apply as in other cases of agency, and as these have been discussed earlier (*h*), it is not proposed to repeat them here, but the agency constituted merely by the ordinary relationship of partnership does not make one partner the agent of the others for the purpose of committing an act of bankruptcy (*i*).

The debts to support a joint petition must be a joint debt of the partners, and each of the partners against whom a receiving order is sought must have committed an act of bankruptcy (*j*); the act of bankruptcy need not be a joint act or an act of the same kind. This, however, does not mean that a creditor must wait until all partners have committed an available act of bankruptcy, for any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against any one or more partners of the firm without including the others (*k*).

A bankruptcy notice against a firm can issue on judgment rightly obtained against that firm, even after it has been dissolved, and on a petition a receiving order can be made against any one or more of the late partners, as they are still liable on the undischarged partnership debts (*l*).

Any two or more persons, being partners or any person

(*e*) *Mulls v. Bennett* (1814), 2 M. & S. 556; *Spencer v. Billing* (1812), 3 Camp. 310.

(*f*) *Cooke v. Charles A. Vogeler Co.*, [1901] A.C. 102.

(*g*) *Re Wenham*, [1900] 2 Q.B. 698. (*h*) p. 43, *ante*.

(*i*) *Ex p. Blain* (1879), 12 Ch.D. 522.

(*j*) *Ex p. Clarke* (1832), 1 Deac. & Ch. 544.

(*k*) B.A. s. 114.

(*l*) *Re Wenham*, [1900] 2 Q.B. 698.

carrying on business under a partnership name, may take proceedings or be proceeded against under the Act in the name of the firm, but in such case the Court may, on application by any person interested, order the names of the persons who are partners in such firm or the name of such person to be disclosed in such manner, and verified on oath or otherwise, as the Court may direct (*m*).

But where a firm of debtors file either a declaration of inability to pay their debts or a bankruptcy petition the same must contain the names in full of the individual partners, and if such declaration or petition is signed in the firm name it shall be accompanied by an affidavit made by the partner who signs the declaration or petition, showing that all the partners concur in the filing of the same (*n*).

Where there are more respondents than one to a petition the Court may dismiss the petition as to one or more of them without prejudice to the effect of the petition as against the other or others of them (*o*).

Receiving Order.—A receiving order made against a firm shall operate as if it were a receiving order made against each of the persons who at the date of the order is a partner in that firm (*p*). Where a receiving order has been made on a bankruptcy petition by or against one member of a partnership, any other bankruptcy petition by or against a member of the same partnership must be filed in or transferred to the Court in which the first-mentioned petition is in course of prosecution, and, unless the Court otherwise directs, the same trustee or receiver shall be appointed as may have been appointed in respect of the property of the first-mentioned member of the partnership, and the Court may give such directions for consolidating the proceedings under the petitions as it thinks just (*q*).

Statement of Affairs.—In cases of partnership the debtors must submit a statement of their partnership affairs, and each debtor must submit a statement of his separate affairs (*r*).

First Meeting of Creditors.—Where a receiving order is made against a firm, the joint and separate creditors must collectively be convened to the first meeting of creditors (*s*).

(*m*) B.A. s. 119.

(*p*) B.R. 285.

(*s*) B.R. 291.

(*n*) B.R. 281.

(*q*) B.A. s. 116.

(*o*) B.A. s. 115.

(*r*) B.R. 287.

Public Examination.—As has been previously stated, for the purpose of approving a composition or scheme by joint debtors, the Court may, if it thinks fit, and on the report of the Official Receiver that it is expedient so to do, dispense with the public examination of one of the joint debtors if he is unavoidably prevented from attending the examination by illness or absence from the United Kingdom (*t*).

Composition or Scheme of Arrangement.—The joint creditors, and each set of separate creditors, may severally accept compositions or schemes of arrangement. So far as circumstances will allow, a proposal accepted by joint creditors may be approved in the prescribed manner, notwithstanding that the proposals or proposal of some or one of the debtors made to their or his separate creditors may not be accepted (*u*).

Where proposals for composition or schemes are made by a firm, and by the partners therein individually, the proposal made to the joint creditors is considered and voted upon by them apart from each set of separate creditors, and the proposal made to each set of separate creditors is considered and voted upon by such separate set of creditors apart from other creditors. Such proposals may vary in character and amount. Where a composition or scheme is approved, the receiving order is discharged only so far as it relates to the estate, the creditors of which have accepted the composition or scheme (*v*).

Adjudication.—No order of adjudication can be made against a firm in the firm's name, but it shall be made against the partners individually (*w*).

On the adjudication in bankruptcy of a partnership the trustee appointed by the joint creditors, or by the Board of Trade under s. 19 (6) or s. 78 (3) of the Act (*x*), as the case may be, must be the trustee of the separate estates. Each set of separate creditors may appoint its own committee of inspection; but if any set of separate creditors do not appoint a separate committee the committee (if any) appointed by the joint creditors is deemed to have been appointed also by such separate creditors (*y*).

EFFECT OF ADJUDICATION

1. Where the Joint Estate is not Administered in Bankruptcy.—There is, of course, nothing to prevent a

(*t*) B.A. s. 16 (7).

(*w*) B.R. 288.

(*u*) B.R. 292.

(*x*) See pp. 112, 113, *ante*.

(*v*) B.R. 293.

(*y*) B.R. 294.

member of a partnership becoming bankrupt in respect of a separate debt, or, as has been noted above, one or more but not all may be made bankrupt in respect of a joint debt. Subject to any agreement between the partners the partnership is dissolved as regards all the partners by the bankruptcy of any partner (z). The trustee does not therefore become a partner, but becomes a tenant in common in equity with the other partners of the partnership assets, subject, however, to an account,

"for it is clearly established as a general principle of law, that
 "if one partner becomes a bankrupt, his assignees can obtain
 "no share of the partnership effects, until they first satisfy all
 "that is due from him to the partnership" (a).

Although strictly the trustee is entitled to put a person in possession of all partnership property this is rarely done, as solvent partners make arrangements to secure payment to the bankrupt's trustee of his share either by agreement or through the intervention of the Court (b). Unless there has been some misconduct by the solvent partner, or he is abroad or dead, the administration of the partnership affairs for the purpose of ascertaining the bankrupt's share and paying it to the trustee is as a rule carried out by him (c).

Partner's Rights against Bankrupt Partners.—A provision in a partnership agreement for a valuation, in the event of a partner's bankruptcy, of that partner's share appears to be valid (d), although judicial doubts on this point have been expressed. But such agreement must not be made in anticipation of bankruptcy, or deprive or delay the creditors of the benefit of the value of any partnership property (e).

The solvent partner administering the joint property may restrain the trustee from interfering by injunction (f); he must allow the trustee to inspect the partnership books and furnish him with proper accounts (g).

Trustees' Rights in Respect of Partnership Property.—The Partnership Act, 1890, does not fix the date of dissolution in

(z) Partnership Act, 1890, s. 33 (1).

(a) *Per Lord TINDERDEN*, C J, in *Holderness v. Shackels* (1828), 8 B. & C. 612, at p. 618.

(b) *Fox v. Hanbury* (1776), 2 Cowp. 445; *Lindley on Partnership*, 10th ed., p. 785.

(c) *Ex p. Owen* (1884), 13 Q.B.D. 113; *Lindley on Partnership*, 10th ed., p. 813.

(d) *Whitmore v. Mason* (1861), 2 J. & H. 204.

(e) *Collins v. Barker*, [1893] 1 Ch. 578, and *Whitmore v. Mason*, *supra*.

(f) *Allen v. Kilbre* (1819), 4 Madd. 464.

(g) *Ex p. Stoveld* (1823), 1 Gl. & J. 303.

cases of bankruptcy, but it is presumably the commencement of the bankruptcy, *i.e.* the date of the first available act of bankruptcy (*h*). But although the bankrupt partner's authority to deal with the partnership assets is determined from that date, the trustee cannot avoid a *bona fide* transaction between that date and the receiving order by reason of s. 45 (*i*). Similarly, the solvent partners are bound by such transactions, if they have allowed the bankrupt to act in partnership matters, because they cannot disavow the acts of one whom they have held out as an agent. But where the transaction is tainted with fraud such considerations do not apply, and an estoppel, which would operate against the bankrupt, is not binding on the trustee.

Thus in *Heilbut v. Nevill* (*k*), a partner, who subsequently became bankrupt, in fraud of the partnership and as a fraudulent preference, endorsed certain partnership bills of exchange to one of his separate creditors, who was privy to the fraud.

It was held that the trustee was not bound by the estoppel on the bankrupt, and could jointly with the solvent partner sue the creditor thus fraudulently preferred for the value of the bills.

Following the general principle, the trustee is not entitled to any higher rights against the solvent partners than the bankrupt had, and is therefore only entitled to the bankrupt's share as at the date of dissolution, subject to one apparent exception, *i.e.* in the absence of agreement if the solvent partners continue to trade with the partnership assets, without any winding up or other settlement, the trustee, like a retiring partner, is entitled to have the profit attributable to the employment of the bankrupt's capital accounted for to him (*l*). Likewise, the solvent partners are only entitled to a lien on the partnership property as constituted on the date of the dissolution (*m*).

Right to Sue in Respect of Partnership Assets.—By s. 118 a solvent partner can sue on a partnership contract without joining the bankrupt partner's trustee. Also, where a member of a partnership is adjudged bankrupt, the Court may authorise the trustee to commence and prosecute any action in the names of the trustee and of the bankrupt partner, and any release by

(*h*) See p. 131, *ante*, and Lindley on Partnership, 10th ed., pp. 664 and 802.

(*i*) See p. 135, *ante*.

(*k*) (1870), L.R. 5 C.P. 478.

(*l*) *Crawshay v. Collins* (1808), 15 Ves. 218; Partnership Act, 1890, s. 42.

(*m*) *Payne v. Hornby* (1858), 25 Beav. 280.

such partner of the debt or demand to which the action relates is void. Notice of the application for authority to commence the action must be given to such solvent partner, who may show cause against it, and on his application the Court may, if it thinks fit, direct that he shall receive his proper share of the proceeds of the action, and, if he does not claim any benefit therefrom, he shall be indemnified against costs in respect thereof as the Court directs (*n*).

It must also be noted that where one partner of a firm is adjudged bankrupt, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt until all the separate creditors have received the full amount of their respective debts (*o*).

2. Where the Joint Estate is Administered in Bankruptcy.—As previously stated, each partner is individually adjudicated bankrupt, and there is only one trustee (*p*). The joint and separate estates are, however, kept distinct, for, in the case of partners, the joint estate is applicable in the first instance in payment of their joint debts, and the separate estate of each partner is applicable in the first instance in payment of his separate debts. If there is a surplus of the separate estates it is dealt with as part of the joint estate. If there is a surplus of the joint estate it is dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate (*q*).

“But in bankruptcy there is only one administration of joint and separate estates, though for the convenience of administration the creditors are divided into two classes. And the rule is clear, that when a creditor is competing with the other creditors he cannot prove for interest accrued due after the adjudication. Of course, if he has a security for his debt, the case is different. But, in the absence of any security, a creditor cannot get interest on his debt accrued subsequently to the adjudication until the creditors, joint and separate, have been satisfied the principal of their debts” (*r*).

But now, by s. 66 (1) and Sched. II, r. 21, the date is not that of adjudication but that of the receiving order and at a rate not exceeding 5 per cent.

(*n*) B.A. s. 117.

(*o*) B.A. s. 63 (1).

(*p*) B.R. 288, 294; B.A. s. 116. (*q*) B.A. s. 33 (6).

(*r*) *Per* JAMES, L.J., in *Ex p. Findlay* (1881), 17 Ch. D. 334.

EXCEPTIONS TO RULE FOR SEPARATE ASSETS MEETING
SEPARATE LIABILITIES

To the rule that the separate estate should in the first place be applied in the payment of the separate debts there are the following apparent exceptions.

(1) *Joint debtors may prove against and receive dividends from each of the separate estates, provided*

(a) *there is no joint estate, and*

(b) *there is no solvent partner who can be sued (s).*

(a) However small the joint estate may be, it will prevent the joint creditors proving against the separate estates (t), unless it is pledged to its full value (u). An inquiry will be directed if there is any doubt as to its existence (v). If, where joint creditors have received dividends out of separate estates on the assumption that there is no joint estate, joint estate is discovered, the separate estates are entitled to be reimbursed out of the proceeds of the joint estate (w).

(b) A partner in the bankruptcy will be deemed solvent until his insolvency is judicially declared (x) or is admitted (y). But the mere existence of such solvent partner if he cannot be sued (e.g. he is abroad (z)) or the estate of a deceased partner which is solvent (a) will not defeat this right of the joint creditors.

(2) *Where a joint creditor is the petitioning creditor in a separate adjudication he may receive dividends pari passu with the separate creditors out of the separate estate (b).* This is so even if there is a separate debt due to him that is sufficient to have supported a petition (c), or even if he will be only trustee for another joint creditor as to part of the dividend he will receive (d).

(s) *Re Budgett*, [1894] 2 Ch. 557.

(t) *Ex p. Taitt* (1809), 16 Ves. 193.

(u) *Ex p. Geller* (1817), 2 Madd. 262.

(v) *Ex p. Birley* (1841), 1 M.D. & De G. 387; 2. M.D. & De G. 354.

(w) *Ex p. Willcock*, 2 Rose, 392.

(x) *Ex p. Janson* (1818), 3 Madd. 229.

(y) *Re Carpenter* (1890), 7 Morr. 270.

(z) *Ex p. Pinkerton* (1801), 6 Ves. 814.

(a) *Ex p. Bauerman* (1838), 3 Deac. 476.

(b) *Ex p. Ackerman* (1808), 14 Ves. 604.

(c) *Ex p. Burnett* (1842), 2 M.D. & De G. 357.

(d) *Ex p. De Tastet* (1810), 17 Ves. 247.

- (3) *By paying the separate creditors in full the joint creditors can prove against the separate estate (e).* If the petitioning creditor is a joint creditor he is deemed a separate creditor for this purpose, and must be paid in full (e).

Joint Creditors having Security on Separate Estate.—

In administration the joint and separate estate are considered as distinct, so much so that if a joint creditor has in respect of that debt a security on one of the partners' separate property he may prove against the joint estate for the full amount without giving up his security, and *vice versa*; the security in such cases is treated as merely collateral (f).

This principle extends to the case of a person who is a creditor for both a joint and a separate debt and holds a separate security in respect of both, if such security realises more than sufficient to pay the separate debt he may still prove for the full amount of the joint debt without deducting the security (g). In such a case, before realisation he may appropriate his security either to his joint or separate debt, whichever is to his advantage (h).

Distinct Accounts.—In order to facilitate keeping estates distinct where a receiving order has been made against debtors in partnership, distinct accounts must be kept of the joint estate and of the separate estate or estates. No transfer of a surplus from a separate estate may be made to the joint estate on the ground that there are no creditors under such separate estate until notice of the intention to make such transfer has been gazetted (i).

What is Joint and what is Separate Estate.—Subject to the exceptions dealt with below, whatever is joint property and whatever is separate as between the partners themselves is also so for the purposes of administration in bankruptcy. *Bona fide* transactions between the partners can change joint into separate property, and *vice versa* (j). And this is so even if the estate from which the property is transferred is at the time insolvent (k).

(e) *Ex p. Chandler* (1803), 9 Ves. 35.

(f) *Ex p. Peacock* (1825), 2 Gl. & J. 27; *Re Plummer* (1841), 1 Ph. 56; *Ex p. West Riding Union Banking Co.* (1881), 19 Ch. D. 105.

(g) *Ex p. Watson* (1880), 42 L.T. 516.

(h) *Ex p. Dickinson* (1875), L.R. 20 Eq. 767.

(i) B.R. 368.

(j) *Ex p. Ruffin* (1801), 6 Ves. 119.

(k) *Ex p. Walker* (1862), 31 L.J. Bcy. 69.

"In order that an agreement may have the effect of converting joint into separate estate, or *vice versa*, the agreement must be executed, and not be executory merely. But this does not . . . mean that what has to be done under the agreement must be entirely completed, but that nothing remains to be done to make the agreement operative" (l).

Any such agreement must not be tainted with fraud (m), and must be such that there is no right in the transferring partner to have the transferred assets applied in indemnifying him against the liabilities of the firm (n).

EXCEPTIONS TO GENERAL RULE FOR SEPARATE PROPERTY

1. Reputed Ownership.—Where a partner has permitted his separate property to be in the reputed ownership of the firm, such property will be treated as joint and not as separate estate (o).

Such questions often arise when there is a change in the firm, either by a partner retiring or a new one being admitted. But although the property in such cases is transferred to the new firm, it may have been left in the reputed ownership of the old. This applies particularly to goods in the hands of third persons and debts which must, in the event of bankruptcy, be dealt with as joint estate of the old firm (p).

A representation that there is a partnership will create a joint estate by way of reputed ownership.

In the case of *Re Rowland and Crankshaw* (q), R. and C. agreed that R. should carry on and manage a business in the name of R. & Co. on behalf of C., R. to be paid a salary and commission. C. had bought goods for the business. On the bankruptcy of both C. and R. it was held that the book debts and stock-in-trade of R. & Co. were joint estate of C. and R.

From the previous discussion on reputed ownership (o) it follows that joint estate can only be created by this doctrine where the apparent owner (*i.e.* the ostensible partner) has become bankrupt. Therefore, if in the above case only C. had become bankrupt, the whole of the property of R. & Co. would have been administered as C.'s separate estate.

(l) *Per* NEVILLE, J., in *Pearce v. Buteel*, [1916] 2 Ch. at p. 556.

(m) *Anderson v. Maltby* (1793), 2 Ves. 244.

(n) *Ex p. Morley* (1873), 8 Ch. App. 1026.

(o) For reputed ownership, see pp. 194, *ante*.

(p) *Ex p. Burton* (1822), 1 Gl. & J. 207; *Ex p. Harris* (1816), 1 Madd. 583.

(q) (1866), 1 Ch. App. 421.

2. Swelling or Diminishing Joint and Separate Estates by Proof against each other, or by Rules Prohibiting such Proof.—The principle that a debtor cannot prove in competition with his own creditors usually prevents this, but not always, as there are exceptions and cases where principle does not apply:

(a) *Where Distinct Trades are Carried on with Distinct Capitals.*—Two distinct propositions must be considered under this head.

First, where there is in reality no competition, and therefore not strictly an exception, but merely cases where the rule does not apply; and

Secondly, the true exception where there is competition, but the debt has arisen in the ordinary course of trade.

The distinction is of importance because, in the first case, the debt may have been contracted on any score; and, in the second, it must have been incurred in the ordinary course of trade.

First, if there are two firms neither of which has the same partners, *e.g.* if one firm is A. and B. and the other A. and C., either firm can prove against the other, as the creditors of one are not creditors of the other and there is no competition (*r*). But if there is a major and minor firm, *e.g.* A. B. and C. in one firm, and A. and B. or B. only in the other, competition may arise according to whether proof is sought by the major firm against the minor, or *vice versa*. All creditors of the major firm are creditors of the minor firm, but the converse is clearly not so. Hence there is no competition if the major firm proves against the minor and proof is there allowed in this case on any score.

Secondly, where there is competition, *i.e.* where the partners in the two firms are the same persons, or proof is sought by the minor firm against the major, exception to the rule is allowed and proof admitted in the case of a debt contracted in the regular way of trade (*s*). Proof can therefore be for goods, but not for money lent (*r*), except, perhaps, in the case of bankers who may be said to deal in money (*t*). Where the partners are identical, or a minor firm is seeking proof against the major firm, the trades must be distinct. One of the interlocked firms must not merely be a branch of the other.

(*r*) *Ex p. Thompson* (1834), 3 Deac. & Ch. 612.

(*s*) *Ex p. Sillitoe* (1824), 1 Gl. & J. 374.

(*t*) *Ex p. Williams* (1843), 3 M.D. & D. 433.

(b) *Where there has been Fraud.*—Where a partner has fraudulently converted partnership property, or where the separate property of a member of a firm has been fraudulently converted by his co-partners, proof is therefore admitted against it in respect of the property converted, as it would be manifestly unjust that an estate should benefit by such fraud (*u*), and this is so even if in the result the estate is not greater by reason of the fraud (*v*).

When solvent partners prove under this rule against the separate estate of their former partner they rank as separate creditors, although the property converted had belonged to them jointly with the bankrupt and was not theirs exclusively (*w*). The mere fact that a partner is indebted to the firm through a breach of partnership agreement is insufficient to establish fraud for this purpose. In effect, the partner must have stolen the property and his act must not have been acquiesced in or condoned by his partners (*x*). If the partners make any arrangement whereby the liability is treated as a matter of partnership account they cannot prove under this exception (*z*).

(c) *Where one Partner has been Discharged from Joint Debts.*—Where a partner has obtained his order of discharge in bankruptcy (*a*) or is otherwise discharged from liability on the joint debt (*e.g.* the Statute of Limitations (*b*)), and is therefore no longer a debtor to the creditors of the firm, he is not competing with his own creditors if he proves against the firm's estate, and such proof is therefore allowed.

(d) *Proof by a Partner or his Estate against the Estate of a Bankrupt Co-partner.*—As any surplus of the separate estate of each partner, after satisfying his separate debts, is liable for the joint debts, it is clear that such proof would be competing with the partner's own creditors (*i.e.* the joint creditors) for the surplus, so long as there are joint creditors and a possibility of their claims falling on such a surplus, and therefore in such case proof is not allowed (*c*).

(u) *Exp. Sillitoe* (1824), 1 Gl. & J. 374; *Exp. Lodge and Fend* (1790), 1 Ves. 166.

(v) *Lacey v. Hill* (1876), 4 Ch. D. 537.

(w) *Exp p. George* (1814), 3 Ves. & B. 31.

(x) *Exp p. George, supra*; *Exp p. Smith* (1821), 1 Gl. & J. 74; *Exp p. Turner* (1833), 4 D. & Ch. 169.

(z) *Exp p. Turner, supra*.

(a) *Exp p. Atkins* (1820), Buck, 479.

(b) *Exp p. Smith* (1884), 14 Q.B.D. 394.

(c) *Exp p. Ellis* (1827), 2 Gl. & J. 312; *Exp p. Gordon* (1874), 10 Ch. App. 160, affirmed on appeal *sub nom. Nanson v. Gordon* (1876), 1 App. Cas. 195.

The rule operates only for the benefit of the joint creditors by preventing the creditor partner coming into competition with them, and therefore, if the estate of the debtor partner is insufficient for his separate debts, there can be no surplus for the joint creditors, and no question of competition can arise, and therefore proof is allowed (*d*).

It must be remembered that the separate creditors of the partners are not a single constituency, who have a right to the separate assets of the partners in priority to the joint creditors, but the separate creditors of each partner are each a separate constituency, and the separate creditors of one partner have no interest in the separate estate of another partner. Therefore, a partner whose separate estate is solvent can prove against a partner whose estate is insolvent (*e*), although the dividend received may merely go to swell the surplus of his estate that will be divisible amongst the joint creditors. Competition cannot arise, and proof is therefore allowed, if there have never been joint debts or if all those which existed are paid, barred, satisfied, or converted into separate debts. This is well illustrated by *Ex p. Grazebrook* (*f*).

In that case a dormant partner retired, and account had been taken between him and the continuing partner and a balance found due to the retiring partner. The creditors adopted the continuing partner as the sole person liable for the debts formerly due from the firm. Upon the bankruptcy of the continuing partner, although debts incurred before the dissolution were still unpaid, it was held that as they had been converted into separate debts of the continuing partner, there was no competition, and the retired partner could therefore prove for the balance due to him on the taking of the partnership accounts which was still unpaid.

Although, because there are joint debts outstanding and part of a bankrupt partner's separate estate is available for their payment, his co-partners could not prove for a debt, yet, if in consideration of the co-partner cancelling that debt, the bankrupt partner has taken upon himself the liability of a debt due from his co-partner to a third party, such third party may prove for this debt as substituted for the first in competition

(*d*) *Ex p. Topping* (1865), 34 L.J. Bcy. 13.

(*e*) *Re Head*, [1894] 1 Q.B. 638.

(*f*) (1832), 2 D. & Ch. 186.

with the other separate creditors, whether the joint creditors have been paid or not (g).

It has been seen above that proof is allowed by the separate estate against the joint estate, and *vice versa*, in cases of fraudulent conversion and of debts contracted in the course of carrying on distinct trades. The same principles apply to proof by partner against partner in similar cases (h).

Where a person has been induced by fraud to enter into a partnership, proof is admissible for the amount paid to the bankrupt for the share in the partnership (i).

If one partner has paid joint debts, whether before or after bankruptcy, he can prove against the separate estate of each of his partners for the amount of the share of the debts which such partner ought to have paid (j). The amount of the proof admitted against each partner is not only for the amount of the share of the debts that such partner ought to have paid, but also each partner must contribute as surety for the other partners for what is due from them but which they cannot pay, and the amount of the proof is adjusted accordingly (k).

In any case where proof is admissible the partnership accounts must be taken before it can be admitted in order that the debt can be proved really to exist and not be cancelled out by some set-off on taking the account (l).

(e) *A Deceased Partner*.—The estate of a deceased partner is liable for the debts of the firm (m). Therefore, so long as these liabilities exist the executors cannot prove against the joint estate of the surviving partners for what is due to them; but if these debts are paid (n), or the deceased estate is relieved of them (o), proof is allowed (p) except for assets which the

(g) *Re Todd* (1844), De Gex, 87.

(h) *Ex p. Westcott* (1874), 9 Ch. App. 626.

(i) *Hamul v. Stokes* (1817), Dan. 20; 4 Price, 161; *Bury v. Allen* (1845), 1 Coll. 589, and the order made in *Ex p. Broome* (1811), 1 Coll. 598.

(j) *Ex p. Watson* (1819), 4 Madd. 477; *Wood v. Dodgson* (1813), 2 M. & S. 195.

(k) *Ex p. Hunter* (1820), Buck, 552.

(l) *Ex p. Maude* (1867), 2 Ch. App. 550.

(m) Partnership Act, 1890, s. 9. Although in general this is limited to liabilities arising before death there are cases in which the deceased partner's estate is responsible for liabilities arising after death. This question is beyond the scope of this book, and the reader is referred to Lindley on Partnership, 9th Ed., p. 260, and pp. 730 *et seq.*

(n) *Ex p. Moore* (1826), 2 Gl. & J. 166.

(o) *Ex p. Andrews* (1884), 25 Ch.D. 505.

(p) *Ex p. Edmonds* (1862), 4 De G. F. & J. 488.

executors have properly brought into or left in the business as capital of the deceased (*q*).

Before proof for such asset is admitted against the joint estate of the surviving partners all debts contracted both before and after the death must be paid. But where executors properly leave assets of the deceased in the business, not as capital thereof but as a loan, then, when all debts for which the surviving partner and the deceased were jointly liable have been paid (*i.e.* including those contracted after death), proof is admitted (*p*).

If executors improperly employ assets of the deceased in the business, such assets do not form part of the surviving partner's joint estate, and in respect of them proof is allowed in competition both with the creditors whose debts have accrued since the death and also those whose debts accrued due prior to death (*r*). With regard to the last it is admitted in competition with them on the same principle that it is admitted in cases of fraud.

Rule against Double Proof and Election.—In certain cases a creditor may be both a joint and a separate creditor, *i.e.* he may have in him at the same time the right of suing either all the partners jointly or some or one of them separately from the rest. Just as in suing at law he must elect which remedy he pursues, so in bankruptcy the rule is that he must elect against which estate he proves, but cannot prove against both (*s*). There must, however, be a joint estate before the creditor is put to his election (*t*). There is, however, an exception to this rule that covers more debts than the rule itself. The exception is contained in r. 19 of Sched. II, which is as follows:

If a debtor was, at the date of the receiving order, liable in respect of distinct contracts as a member of two or more distinct firms, or as a sole contractor, and also as member of a firm, the circumstance that the firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof in respect of the contracts, against the properties respectively liable on the contracts.

(*q*) *Ex p. Butterfield* (1847), *De Gex*, 570; *Ex p. Garland* (1804), 10 Ves. 110.

(*r*) *Ex p. Garland*, *supra*.

(*s*) *Ex p. Bond* (1745), 1 Atk. 98.

Although the contracts must be "distinct contracts" they may be contained in one instrument (*t*). As the exception is confined to contracts, breaches of trust by a firm and frauds imputable to a firm put the beneficiary and the defrauded creditor to his election (*u*); although acts make the beneficiary or defrauded creditor both joint and separate creditors (*v*). Where, however, there are distinct contracts, *e.g.* where a member of a firm is an express trustee and joins with his partners in misappropriating the trust funds, then double proof is allowed, for he is liable as trustee for the breach of express trust and as a partner for the breach of implied trust (*w*).

This must be distinguished from the case where no member of the firm is an express trustee, then there is only one contract (implied trust) and the creditor must elect (*x*).

What amounts to Election.—As the creditor, in electing against which estate he will pursue his remedy, will be guided in his choice by their relative solvency, he is therefore entitled to defer his election for a reasonable time in order to inquire into the relative state of the funds. The mere fact of proving against one estate and even receiving a dividend from it will not necessarily preclude him from electing to go against the other (*y*). But once he has taken up a position quite inconsistent with the one he now seeks to take up with both a full knowledge of his position and the material facts of the case he will be held to have elected beyond recall (*z*).

Splitting Demands by a Secured Creditor.—In the ordinary way a secured creditor can only prove in one of the following ways:—

- (a) by giving up his security, and proving for the whole debt; *or*
- (b) by valuing his security and proving for the balance; *or*
- (c) by realising his security and proving for the balance (a).

(*t*) *Ex p. Honey* (1871), 7 Ch. App. 178.

(*u*) *Ex p. Adamson* (1878), 8 Ch. D. 807.

(*v*) *Ex p. Poulson* (1844), De Gex, 79.

(*w*) *Re Parkers* (1887), 19 Q.B.D. 84; *Re Macfadyen & Co.* (No. 2), [1908] 2 K.B. 817.

(*x*) *Re Kent County Gas Light & Coke Co., Ltd.*, [1913] 1 Ch. 92.

(*y*) *Ex p. Adamson* (1878), 8 Ch. D. 807.

(*z*) *Ex p. Liddel* (1814), 2 Rose, 34; *Ex p. Dixon* (1841), 2 M.D. & D. 312.

(a) See p. 259, *ante*.

But this does not apply where the security is over the property of a stranger or where a separate creditor of a partner has security from his firm or a firm's creditor has security from a partner (*b*). Therefore, a joint and separate creditor who must elect by coupling this principle with his election may:

- (1) Retain the security from the one estate and make what he can of it, and at the same time prove for the whole amount of his debt against the other estate; *or*
- (2) Give up his security and prove for the whole of the secured debt, *i.e.* the amount due on the security against the estate to which the security belongs, and then prove for the residue of the debt against the other estate, thus splitting his demand and proving for part against the joint estate and part against the separate estate (*c*). But as the majority of cases of this sort will fall within the exception of distinct contracts, where double proof is permitted, it is not now important and will not be pursued further.

Consolidation of Estates.—The old law as to this has been stated as follows:

Where the joint and separate estates are so blended together as to render it impracticable to keep them separate, the Court will consolidate them, but not where the accounts can be kept distinct and a single creditor objects (*d*). Even if the creditors at a general meeting agree to consolidate the estates, the Court will not sanction the measure without inquiry whether the proposed consolidation will be for the benefit of the creditors generally (*e*).

This rule appears to exist still. The Court will not order consolidation

because there are great difficulties in the distribution;
because it is difficult to ascertain whether creditors are joint or separate or whether there has been novation or not; and
because such difficulties add to the expense (*f*).

The Effect of Discharge in the Case of Partners.—Partners are each individually adjudicated bankrupt (*g*). If

(*b*) See p. 344, *ante*.

(*c*) *Ex p. Ladbroke* (1826), 2 Gl. & J. 81; *Ex p. Hill* (1837), 3 M. & Ayr, 175.

(*d*) *Ex p. Sheppard* (1833), M. & B. 415.

(*e*) *Ex p. Strutt* (1821), 1 Gl. & J. 29; Archbold Bankruptcy, p. 382.

(*f*) *Re Kriegel, Waring & Co.* (1893), 10 Morr. 99.

(*g*) See p. 339, *ante*.

all the partners are discharged each one is released from all his liabilities joint and separate (*h*); and if only one has been adjudicated and he is discharged he is released from all his liabilities both joint and separate (*i*).

LIMITED PARTNERSHIPS

When it Exists.—This is a special form of partnership which may consist, in the case of a banking business, of not more than ten persons and, in the case of any other partnership, of not more than twenty persons, and must consist of one or more persons, called general partners, who are liable for all debts and obligations of the firm, and one or more persons, called limited partners, who at the time of entering into such partnership, contribute thereto a sum or sums as capital or property valued at a stated amount, and who are not liable for the debts or obligations of the firm beyond the amount so contributed.

A limited partner may not take part in the management of the business, if he does he becomes liable as a general partner, nor can he bind the firm (*j*).

Dissolution of Partnership.—A limited partnership is not dissolved by the death or bankruptcy of a limited partner, and the lunacy of a limited partner is not a ground for dissolution of the partnership by the Court unless the lunatic's share cannot be otherwise ascertained and realised. Such a partnership has to be registered (*k*).

Liquidation of Partnership.—By s. 6 (4) of the Limited Partnerships Act, 1907, such partnerships were wound up by a petition under the Companies Acts, but now, by the Bankruptcy Act, 1914, s. 127, subject to modifications made by the rules under the Act, the law of bankruptcy applies as if such partnerships were ordinary partnerships, and on all general partners being adjudged bankrupt the assets of the limited partnership vest in the trustee.

A creditor's petition against such a firm must be served at the principal place of business of the limited partnership, as registered, by delivering a sealed copy of the filed petition to

(*h*) *Howard v. Poole* (1734), 2 Str. 995.

(*i*) *Ex p. Yale* (1721), 3 P.W. 24 n.

(*j*) Limited Partnerships Act, 1907, s. 6 (1).

(*k*) *Ibid.* s. 5.

one of the general partners there, or to some other person having, at the time of service, the control or management of the partnership business there, unless the Court otherwise orders (*l*).

Such a partnership may present a petition in bankruptcy as debtors in the name of the firm. The petition must be signed by a general partner and must contain in full the names of the general partners, and if the petition is signed in the firm name the petition must be accompanied by an affidavit made by the partner who signs the petition, showing that all the general partners concur in filing the same (*m*).

A petition by a limited partnership as debtors or against them must be presented to the Court having bankruptcy jurisdiction in the place where the registered office of the limited partnership is situate, but the bankruptcy judge of the High Court may at any time, for good cause shown, remove the proceedings to any other Court having jurisdiction in bankruptcy (*n*).

Effect of Receiving Order.—A receiving order made against a firm registered under the Limited Partnerships Act, 1907, operates as if it were a receiving order made against each of the persons who, at the date of the order, is a general partner in the firm (*o*).

Where a receiving order is made against a limited partnership any past or present limited partner has the same rights as a creditor who has proved his debt would have to inspect the file, to attend meetings of creditors, and to appear on and take part in the public examination of, or any application for an order of discharge by, any general partner (*p*).

Adjudication.—The assets of a limited partnership, which vest in the trustee in the event of all the general partners being adjudged bankrupt, includes the liability (if any) of the limited partners and past general partners, to contribute to the assets of the limited partnerships, and such liability may be enforced by the trustee by motion in the bankruptcy, but subject to the regulations following:

(1) No present or past limited partner shall be liable to contribute, as such, to the assets of the limited partnership

(*l*) B.R. 282.

(*m*) B.R. 283.

(*o*) B.R. 286.

(*n*) B.R. 284.

(*p*) B.R. 289.

to any greater amount than the amount of any part of his contribution as such limited partner which he may have failed to pay into, or have drawn out, or received back from the partnership assets since he became, or whilst he remained, a limited partner, except in the case of a present limited partner who is a past general partner, and in the case of a past limited partner who has become a present general partner.

(2) No past general partner shall be liable to contribute, as such, to the assets of the limited partnership except in respect of partnership debts and obligations incurred while he continued to be a general partner: but every past general partner who has become a limited partner shall, in addition to any amount which he may be liable to contribute in respect of partnership debts and obligations incurred whilst he continued to be a general partner, be liable to contribute to the assets of the limited partnership to the amount equal to the amount of any part of his contribution, as such limited partner, which he may have failed to pay into or have drawn out, or have received back from the partnership assets since he became, or whilst he remained, a limited partner.

(3) No past partner, general or limited, shall be liable to contribute, as such, to the assets of the limited partnership unless it appears to the Court that the partnership assets otherwise available are insufficient for the payment in full of the partnership liabilities and the costs, charges, and expenses of the administration in bankruptcy of the partnership estate (q).

If some, but not all the general partners are adjudicated bankrupt, then, as in ordinary partnerships, the trustee is only entitled to be paid by the solvent partner; the value of the bankrupt partners' share (r).

(q) B.R. 290.

(r) See p. 339, *ante*.

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